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ABSTRACT

Testimony was heard concerning the long delays in implementation of the 1988 amendments to the Indian Self-Determination and Education Assistance Act. These amendments were intended to reverse years of federal agency resistance to the act's original goal of promoting tribal self-determination through tribal contracting of the operation of federal Indian programs. However, despite the amendments' clear timeframe of 10 months for the development of implementing regulations by federal agencies, the regulations had not been developed 5 years later. Representatives of American Indian and Alaska Native tribes and tribally controlled programs discussed: (1) how the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) bureaucracies had subverted Congress's intentions by delaying promulgation of regulations, by misinterpreting the act in a restrictive manner, and by forcing tribal contractors to bear the brunt of financial shortfalls in funded programs; (2) the lack of tribal participation in the regulatory process; and (3) damaging effects of the delay on provision of educational and health services. Representatives of the BIA and the IHS explained their efforts to draft regulations. A law firm representing several tribes submitted a detailed analysis of the 400 pages of draft regulations being proposed by the BIA and the IHS. (SV)

RC

S. HRG. 103-136

PROPOSED REGULATIONS TO IMPLEMENT THE 1988 AMENDMENTS TO THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

ED 363 478

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING TO ESTABLISH A DETAILED TIMEFRAME FOR THE SWIFT DEVELOPMENT OF NEW IMPLEMENTING REGULATIONS WITH CLOSE TRIBAL PARTICIPATION

MAY 14, 1993
WASHINGTON, DC

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PROPOSED REGULATIONS TO IMPLEMENT THE 1988 AMENDMENTS TO THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

FRIDAY, MAY 14, 1993

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:29 a.m. in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye and Kassebaum.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning and welcome to this hearing of the Committee on Indian Affairs.

In 1988 the Congress enacted comprehensive amendments to the Indian Self-Determination and Educational Assistance Act of 1975. The 1988 amendments were intended to reverse years of Federal agency resistance to the act's original goal of fostering and promoting tribal self-determination through tribally contractive, operation of Federal Indian programs. These amendments were also intended to remove the existing regulatory and statutory barriers to effective and efficient tribal contracting under the act.

The 1988 amendments established a detailed timeframe for the swift development of new implementing regulations with close tribal participation. Within 3 months from the effective date of October 1988, the two Secretaries were to formulate proposed regulations with tribal participation. Within 6 months from the date of enactment, the Secretaries were to submit their proposed regulations to the Committee on Indian Affairs and the House Committee on Interior and Insular Affairs. One month after that, the Secretaries were to have published their proposed regulations in the Federal Register for formal comment. Within a total of 10 months, or August 1989, the Secretaries were directed to promulgate the regulations in final form.

Now we come to May 1993. As of this moment, nearly 5 years since the amendments were enacted into law, no regulations have been published for notice and comment, and no proposed regulations have been promulgated and formally submitted to the Congress for review.

Moreover, despite assurances last year by both departments that new regulations would be completed by the end of September 1992, it appears that completion of a draft set of implementing regulations approved by the proper departmental authorities may be several months away—hopefully, not 5 years away—with final promulgation of regulations as far off as another year.

In February 1993, the departments did release to the committees and to interested tribes a draft set of regulations prior to its clearance by either Secretary Babbitt or Secretary Shalala or the Office of Management and Budget, although this draft had been cleared in January by former Interior Secretary Lujan and former HHS Secretary Sullivan.

This draft has refueled deep concerns among Indian and Alaskan Native tribes over what is perceived to be a continuing resistance to, and even defiance of, the original intent of the Congress in enacting the 1988 amendments. These concerns cut across all issues of contracting, including such areas as contract application and appeal procedures, contract funding, reporting requirements, program standards, programs division, transfer of administrative programs, indirect cost and contract support costs, and financial management. In the mean time, departmental implementation of the 1988 amendments in the field is reportedly haphazard at best.

Due to the depth of the concerns that have been expressed to this committee and the prospect that final promulgation of regulations may take another year, the committee has requested each of the witnesses to share with us their views on the reasons of these excessive delays and to offer suggestions on what corrective actions might be taken to break the impasse that has frustrated the will of the Congress on behalf of the Indian nations when it enacted the 1988 amendments.

The question may be posed in another way. Was this committee established for the BIA or was this committee established for Indian country? Put another way, is this committee impotent, or are we in a position to do something about this?

I am certain those of you who know me, know me as a very patient person. But, there is a limit. I will not tolerate any further defiance of the Congress of the United States.

[Prepared statement of Senator Inouye appears in appendix.]

The CHAIRMAN. Our first panel consists of the chairman of the Jamestown S'Klallam Tribe, W. Ron Allen; chairperson of the Fort Mojave Tribe of California, Nora Garcia; the executive director of the Ramah Navajo School Board of New Mexico, Bennie Cohoe; executive director of the Yukon-Kuskokwim Health Corporation of Alaska, Gene Peltola; the Aberdeen area health board member of South Dakota, Donna Vandall; The health administrator of the Poarch Creek Indians of Alabama, Buford Roland. Please step forward.

Chairman Allen.

STATEMENT OF W. RON ALLEN, CHAIRMAN, JAMESTOWN S'KLALLAM TRIBE, SEQUIM, WA

Mr. ALLEN. Mr. Chairman, good morning. Thank you for the opportunity to be here before you to make this presentation.

You have my written testimony. If I might ask, the panel of tribal leadership has prepared a set of presentations here that have a certain order that we'd like to beg your indulgence of a shifting the players around, asking Mr. Peltola to follow me, then Mr. Cohoe to follow him, Ms. Vandall to follow Mr. Cohoe and Nora Garcia, and concluding with Mr. Roland. We think if we get all of the highlighting points of these issues in order, we feel our testimonies will be of more interest to the committee.

The CHAIRMAN. That is fine. And, if you do have prepared statements, they will be made part of the record.

Mr. ALLEN. Thank you very much.

Well, it's only been half a decade since we were trying to put these regulations together and, quite frankly Mr. Chairman, it's not a very good commentary for the attitude and the disposition of trying to make this act a reality. For centuries, as you know, the tribal people have been the most manipulated, the most regulated and the most controlled people in the United States. It's a relationship something that's been quite frustrating for us. We also are frustrated that every time the tribes have something of value—it doesn't matter whether it's gold, oil, tax privileges, a gaming activity, or just exercising our governmental authority—we always seem to find that experience or that opportunity being taken away from us or being constricted or restricted in one way or another. Quite frankly, we think that's what we're dealing with with regard to these regulations.

I think there's basically a sort of a psychological barrier or set of principles that we're struggling with and that is that the bureaus, whether it's IHS or BIA, that they're constantly unwilling to interpret the law liberally in the interest of the tribes exercising their sovereign or governmental authority. That really saddens us, because as tribal leadership we've been very patient and we've been diligent at trying to make it a reality.

We have worked with them, we have shared with them our views, we have shared with them our involvement in developing laws and persuading Congress to take a particular course of action. But, we have not availed yet toward any kind of successful or regulatory condition that we think reflects this relationship.

Yet, we will persist and we are persisting as fast as we possibly can. We know that this committee is very well aware of the intent of the Public Law 93-638 Amendment Act, and what the original Act was trying to do. We feel that the main objective was to provide direct control, so that the tribes can discern for themselves, their own prioritization for Federal resources, and that these laws and regulations reflect the conditions that would give us that kind of liberty, that kind of discretion.

I think that the self-government demonstration project reflects that objective. Enacted and approved at the same time, you see a great deal of success in self-government in those tribes that are actually implementing that law right now. It really does reflect what these amendments were intended to do and are very successful. Quite frankly, the other tribes that should be enjoying the same kind of privileges and opportunities through these regulations, through the 638 contracting, are not enjoying those same opportunities, and they should be, rightfully so.

The length of time to develop the Public Law 93–638 regulations is somewhat our fault, to a certain extent, because it changed the relationship and the rules including the notion that we're not to be just consulted with, we're actively participating in the management of Indian programs. That's more complicated than it appears on the surface because when you've got over 500 tribes, that's difficult to do. Yet, you'll notice in the beginning, if you observe the reports and the minutes of the meetings, you'll see that over 400 tribes were represented and, of course, that representation narrowed down because the confidence of the Indian leadership in the people who remained actively participating and were comfortable that their issues were being addressed. That participation would slow the process down naturally because you're changing a system, you're changing a mentality.

On the other hand, it doesn't justify what's happened over the last 2.5 to 3 years, because it really has taken place in a forum in which our participation has not been there and the attitude of allowing us to actively help shape these regulations are not there, the administration is still not willing to let go, they're still not willing to let us control our own affairs.

I think that this experience is a sad experience because, to me, it shows a bureaucracy that, in my judgment, twists the English language of the law to the interest of the most restrictive views or interpretation. Where they want the law to be liberal in their interest, they will interpret it that way, but where they want it to be restrictive for control, they will interpret it that way. Quite frankly, it is regularly contrary to where the tribes stand and we are always chipping away at them, but with very little success. I think where we are today really reflects that attitude.

We are asking for additional regulatory amendment language and some people have charged us with micromanaging through Congress but, quite frankly, if the bureaucracy is going to try to treat tribes as vendors, almost as if we're standing in line at a hot dog stand at a national park, well, we're going to have to ask Congress to assist us in giving some clear, concise statutory language that says that the tribes do have these privileges, and rights that allow us to act as legitimate governments. That's what we're trying to accomplish, not to be restricted, but asking to liberate the tribes from the harness of bureaucratic control. It is micromanaging to a certain extent—it is only because we are breaking a harness that has been around us now for over 200 years.

So, we are asking the Congress, basically, to help us get these regulations published, and we mean expeditiously—not over the next 4½ years or whatever—we need to move them forward. We do need some additional precise legislative language due to the fact that we have revealed some bureaucratic recalcitrance and that we are experiencing with the system that is not willing to let go or interpret the law liberally.

We want to advance the notion of participating in the system in a meaningful way on a government-to-government basis. We are changing old ways, and we are trying to change attitudes. I've been appreciative of people like Dr. Eddie Brown who has tried to advance this concept, but the reality is that you've got systems that aren't willing to change easily and it's difficult to change even if

the attitude is positive at the top. But, we're not going to give up, Indian country will never give up. We're still going to persevere, we're still going to move this concept forward and change the way tribes do business with the Federal Government.

We think that we have shown successes, as I pointed out, with the self-governance project. We know that once the tribes are provided these privileges and liberties that we believe the Congress intended for us, that you're going to see many successes. You're going to see tribes control and address the problems that you know very well, that exist throughout Indian country.

With that, I conclude my comments. Thank you, Mr. Chairman.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN. Thank you. I believe the next person you want is Mr. Peltola.

Mr. ALLEN. Yes.

The CHAIRMAN. Mr. Peltola.

STATEMENT OF GENE PELTOLA, EXECUTIVE DIRECTOR, YUKON-KUSKOKWIM HEALTH CORPORATION, BETHEL, AK

Mr. PELTOLA. Thank you, Mr. Chairman. My name is Gene Peltola and I've traveled 11 hours and almost 5,000 miles to testify today.

I am the president of the Yukon-Kuskokwim Health Corporation in Bethel, AK, the largest tribal health contractor in the United States. I'm also the chairman of the Alaska Association of Regional Health Directors and our organization is a member of the Alaskan Native Health Board.

Our tribal organization, actually a consortium of 50 remote Yup'ik and Athabascan Tribes located in the Yukon-Kuskokwim River Delta, provides comprehensive primary, secondary, and preventive health care services to nearly 2,000 Indian Native American people spread out across a roadless region of tundra and rivers approximately the size of the States of Oregon or Kansas. To put this in further perspective, our region is larger than the combined New England States of Maine, Connecticut, Vermont, New Hampshire, Massachusetts, and Rhode Island.

Mr. Chairman, for this entire vast area, there is only one medical facility, YKHC's hospital, and only one health care provider, YKHC. Ours is a vast region of extreme climates and enormous barriers to the effective delivery of health care. As a consequence, the health status of our people is, in some categories, among the very lowest of all Native American tribes in the United States. As the committee is aware, many of these conditions are duplicated, although perhaps not quite as accurately, as in the other remote areas of Alaska. You are familiar, yourselves, with the Delta, since you traveled there about 4 years ago.

Over the course of 24 years, YKHC has taken over the operation of increasing portions of the Indian health service system under the authority of Indian self-determination. This has been the direct product of our tribes' desire to control and improve our health care delivery system. The same trend has been evident elsewhere in the Alaska area, where tribes today operate virtually all IHS programs

other than the Anchorage hospital, and the area's administrative offices.

In October 1991, Yukon-Kuskokwim Health Corporation took over the last remaining portion of the IHS system in our region, that being the Bethel hospital. With the addition of these hospital programs today YKHC employs approximately 600 people, operates 48 village-based clinics, and administers a reoccurring IHS budget in excess of $26 billion.

As you know, an indirect cost rate is what sustains the administrative overhead of a tribe's Federal programs. When YK more than doubled the size of its programs, region 10 of the Department of Health and Human Services negotiated a new indirect costs rate for our entire organization. Today, my oral testimony will focus on the problems stemming from that process, Mr. Chairman, problems which persist, notwithstanding the 1988 Indian Self-Determination Act amendments.

In our case, the Federal negotiators at DHHS approved a rate translating to approximately $7 million in indirect costs funds deemed by the government, not just us, to be appropriate and necessary for IHS to support the direct service programs covered by our contract. But, when it came time to finalize our contract, IHS included only $4 million in actual indirect costs funding. The result was a $3 million shortfall in indirect costs in fiscal year 1992 alone. The same problem is again happening in fiscal year 1993 and it has been duplicated throughout our area.

Mr. Chairman, tribal contractors cannot operate programs without full indirect costs. At YKHC we, like any hospital in America, need these funds to operate our payroll systems; our personnel systems; our procurement systems; our administrative offices; our accounting systems; our employee training programs; our monitoring-auditing functions; our risk management programs; our quality control programs; our facility, utility, and housekeeping costs; our insurance costs; our office overhead; and so on.

For us, the $3 million shortfall suffered in fiscal year 1992 and being experienced again during this current fiscal year has forced upon us the very hardest choices. We've had to shift money away from other programs and lay off over 40 employees. We have reduced services throughout our system and will be faced with even greater cuts later this year. In fact, shortly after this panel concludes their testimony, I'm jumping on an airplane and I'm meeting with my CFO and my hospital administrator in Bethel tomorrow at 9 a.m.

Our tribal organizations in Alaska have suffered the same fate, particularly Chikatchamute, Mineluk, and the Southeast Alaska Regional Health Corporation. So, too, as you will hear, the same problem is faced in California, New Mexico, and in our eastern States.

In my written testimony, I tried to explain what YK could do were it not suffering from the current indirect costs shortfall, to give you a concrete sense of what this all means on the ground. The six additional physicians we could hire would provide an estimated 12,000 patient contacts in areas of internal medicine, general family practice, and village visits. We could also provide early cancer screening and detection and childhood screening in schools.

Medevac upgrades and additional diagnostic would all be restored or enhanced were it not for the $3 million indirect costs shortfall.

Mr. Chairman, we recommend strongly that Congress closely scrutinize the way in which IHS is calculating indirect costs shortfalls and reporting, or failing to report, all tribal shortfall needs to Congress. Yes, we can sue to enforce the Act, but should we lay off additional employees to finance this litigation? No. Should we file a contract disputes act appeal and wait 2 to 3 years for an answer from our courts? No.

At home, people die in our villages because basic health care is not available or is inadequate. It has been frequently said, without any exaggeration, that the conditions in many of our villages rival conditions in third world countries. Sir, as you know well, this is sad but true. In most of our villages, water is hauled by hand. Human waste is carried by hand to ponds within the village. Diseases such as hepatitis are rampant. Hopefully, with the continued interest and help of Congress, all of our people can look forward to a brighter, healthier future. For us, one key is strengthening the Self-Determination Act, so we can do all that Congress hoped we could do when it passed the act nearly 20 years ago.

I will stop here so that my fellow tribal leaders and our attorneys can discuss other problems that we have experienced in implementing the 1988 amendments. As you will hear, however, our concerns with the department's direction as revealed in the January, 1993 draft regulations, extends well beyond the indirect costs funding and reporting issues. Issues of contract ability, program standards, appeals, Government sources of supply, redesign flexibility, contract funding suspension, property management, and on and on, cry out for further reform from Congress. We've waited 5 years, only to be told we must wait another year or two to see implementation of the 1988 amendments. We deeply appreciate Congress convening this hearing and we look to you for further action to make the 1988 amendments a reality today.

Thank you, Mr. Chairman, for giving me this opportunity to address you.

[Prepared statement of Mr. Peltola appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Peltola.

Now, Mr. Cohoe.

STATEMENT OF BENNIE COHOE, EXECUTIVE DIRECTOR, RAMAH NAVAJO SCHOOL BOARD, RAMAH, NM

Mr. COHOE. Good morning, Mr. Chairman, members of the committee, staff. My name is Bennie Cohoe. I'm the executive director for Ramah Navajo School Board, located in the western part of New Mexico, which has been contracting with Federal agencies, mainly the Bureau of Indian Affairs, since 1970, prior to the enactment of Indian Self-Determination.

For nearly a quarter of a century, Ramah Navajo School Board has been struggling to improve their educational systems, their health systems, and to become a self-sustaining, self-sufficient community. We have fought through many years where we've had to file appeals, in some cases near lawsuits, to maintain and to also

implement some services that were needed in our community and it has been a long, hard struggle.

I appreciate the opportunity to be heard at this hearing at this time. Also, I would like to request that my testimony be made part of the record.

The CHAIRMAN. Without objection, your prepared statement will appear in the record.

Mr. COHOE. I think that the whole contracting policy is now in the process of being moved on to where the two Federal agencies have written their part, of which we did not have any part in the last 2 years as was intended at the beginning of the 1988 amendment.

With some of the things that we have been struggling through, I feel that the Federal agencies failed to fully support the intent of the amendment and more or less established their own separate new guidelines, new policies, which are now imposed on the contractor that has been contracting for many years. A lot of the unnecessary documents which are now required by the contracting agency from the contractor were supposed to be reduced, but is now just the reverse—we are now forced to submit more reports, more paperwork than the act requested.

It seems as though there is less negotiation on the policy of making it less strenuous on our part in the way of filing reports and maintaining communication. It seems as though communication is not going through, and the constant shift of different officers within the area office and in the lower echelon, all the way down the service unit, seems to be a problem. Every time you get over a problem with one administrator and you think that you have resolved the communication problem and the understanding of the regulations, someone else new moves in and then you have to train that new individual all over again and you try to get them to understand what the contracting is all about. That takes time, so there's a lot of setback in that, and that's been a problem over the years during which we've been contracting.

So, overall, the intent of the amendment has not really been supported by the Federal agency that we have been contracting with. To those of us who have been contracting for quite a number of years, it seems as though every year the direct contract support cost funding has just gone down and at the end of each year we find ourselves in further deficits. the way it was explained to us is that all of us who have been contracting in the past are not affected by the new legislation, where the new legislation says that the contract support dollars are supposed to be there and it seems as though the older contractor does not fall into that category—that's how the rule is being understood by the Federal agency, so those of us who have contracted for a number of years have that same problem of shortfall in contract support costs.

The other problem is that we have contracts in place and that, as a 638 contractor, we're aware of what the rules and regulations mean, and what the intent of Congress is. But then again, at some point in time, the Federal agency needs to fully understand what these regulations are, because of the fact that they have their own interpretation and if their own interpretation is not supported, then they would develop their own policy and they would also try

to insert that into the 638 contracting guidelines, which makes it very inconsistent. It takes a lot of hours and time to have the legal interpretation as to what their intents are, but we know that their only intent is to maintain their own dominance in the way of trying to control Indian affairs, whether it's education or health services.

But, at some point in time, I would like to have the committee understand that the Indian tribes, as contractors, are now ready to move on and provide our own services in the way of education and also health services to our own Indian people. I think that the amendment needs to immediately have tribal participation to move on as soon as possible so that the tribe will have that participation and involvement in the new development of the 1988 amendment that we're talking about today.

I think that your continued support of Indian country is very much needed and we appreciate you holding these hearings, and I'd like to conclude my statement at this time. Thank you.

[Prepared statement of Mr. Cohoe appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Cohoe.

Next, I believe, is Ms. Vandall.

STATEMENT OF DONNA VANDALL, ABERDEEN AREA HEALTH BOARD, ABERDEEN, SD

Ms. VANDALL. Good morning, Senator, and other committee members. I'd like to say good morning to the other panel members that I haven't greeted yet this morning.

I am Donna Whitewing Vandall. I am the executive director of the Aberdeen Area Tribal Chairmen's Health Board and I bring you greetings from the 17 tribal chairmen in the 4 States of the Aberdeen area. We appreciate this opportunity to speak before the committee today.

In preparation for this testimony today, I've submitted the written testimony and in doing so, I had to go back to 1989, to a time when we first became involved with this process. I would like to submit the documents that were faxed in since they may not have been clear. This is a record of the Aberdeen area's involvement with the proposed 638 changes. We begin in 1989 and the documents go through 1990, ending abruptly in April 1990. I think the minutes show an example of how tribes in the Aberdeen area across the country, have worked to respond to the request for proposed amendment changes and tribal involvement.

The comments that were made from the Aberdeen area are just as relevant today as they were in 1989 when a tribal representative came from every tribe, looked over all these amendments and said what we needed to change, why we needed to change it, and how the 638 amendments applied to us. They also said that they don't want to hurt other tribes in other areas that we may not know of, because these are our brothers and sisters. We need to make sure that when we draft amendments, that the amendments are broad enough and wide enough to leave room for people to negotiate their differences; sit down and talk to one another.

When I talked to the Aberdeen area health directors about this hearing, they gave me some recommendations they needed to say:

First, there are inconsistencies about how this act is applied across the Nation from area to area, the differences from tribe to tribe, are so broad and so vast. The back side of that is that there are so many differences from area to area that the regulations need to allow for people and agencies on the local level to sit down and negotiate the differences that we have, these differences are geographical, social, economic, and cultural.

The second thing they said was, mature contracts within this proposed amendment—what does it mean? As far as we can tell, there is no benefit to being a mature contractor. Have people take a look at that and either get rid of it, or give some benefits for being a mature contractor. Some tribes are very advanced and some are just beginning. Again, differences and inconsistencies in applying the regulations.

The third thing they said was, that there are peripheral agencies that we have to deal with like the Department of Transportation, like the Department of Agriculture, like the Office of Engineering Services. There are many kinds of different departments and agencies that we must deal with as tribal governments. How are those 638 regulations in contracting going to apply all the way across these agencies. Once the regulations are published and we work with them, we need to sit down with those agencies and talk seriously about what is happening in Indian country with these regulations.

There are many examples of other agencies not honoring 638 contracting regulations. I'm sure you're going to receive testimony from the tribes in our area on this particular topic.

The fourth thing the health directors said was, there are many moves in this country at this point in time to remove tribal government and replace it with tribal organization. Be very careful how you do that. There are places within these regulations where it is apropos to put tribal organization because it refers to programmatic issues and they are handled by an organization. There are other places in these regulations where it is absolutely imperative that tribal government remain, because it is tribal governments who make those decisions, in behalf of there tribe.

The fifth thing they said was, funding is tied to appropriations. There isn't anything that is going to be said by any panel member up here that doesn't apply to every other area in this country. Funding is tied to appropriations in indirect costs, in programs, in recruitment-retention, in just about everything, and we need to be careful about how we put all those things together in the future. We raise the hopes of the tribal people out there and we focus our energies on a new program that's coming, the bill passes, and no funds are tied to it. How many times can you break your heart? I don't know. We continue on.

The sixth thing that they said for me to tell you was, that "Indian Charlie is still alive and well someplace in this world." As an example, when we met in Nashville very early in 1989 and again in Albuquerque on 638 proposed changes, one of our tribal council members had an opportunity to observe a communique that happened between two Federal employees who were charged with coming out and meeting with us in good faith and discussing the regulation changes. It was in writing and it said, "Who in the

world do these people think they are that they can tell us what to do?" The response was, "Don't worry about it, we'll figure out what they're doing here, we'll hear what they have to say, and we'll go back to DC and figure out a way to defeat them." Indian Charlie is alive and well, someplace in the Federal System, and we know that.

I spoke to tribal leaders as I prepared. I spoke to former tribal leaders and to current tribal leaders, and the one issue that came through loud and strong was this: The basis of everything is blood and land. Blood on the philosophical level—blood is history. Land is the spirituality of our people. On a more pragmatic, realistic level, blood is the tribal blood quantum that identifies us as members of a specific social group. The land is the government which we operate within as tribal governments. On a more personal level, blood is culture and the land is home. Everything that evolves around our government that forces us to contract with Federal agencies must encompass and consider those three definitions of blood and land.

The last thing that I was asked to say was that we do very definitely need some direction within the Bureau of Indian Affairs and Indian Health Service, and our tribal governments encourage Congress and the Senate to appoint someone to the Director of Indian Health Services as soon as possible.

Finally, it is a great honor to work for the 17 tribal governments in the Aberdeen area and it is a singular privilege to have come here today to speak before your committee. Thank you very much.

[Prepared statement of Ms. Vandall appears in appendix.]

The CHAIRMAN. Thank you very much, Ms. Vandall.

Now, may I call on Chairperson Garcia.

STATEMENT OF NORA GARCIA, CHAIRPERSON, FORT MOJAVE TRIBE, NEEDLES, CA

Ms. GARCIA. Thank you. Good morning, Mr. Chairman and members of the committee, staff, tribal leaders that are here, other interested parties.

My name is Nora Garcia and I'm the chairperson for the Fort Mojave Indian Tribe. I also was the former president of the Intertribal Council of Arizona. The Intertribal Council of Arizona is an association of 19 tribal governments that was formed in 1952 to provide a forum for tribal leaders, to protect tribal sovereignty and to strengthen tribal government.

In tribal governments in Arizona, we're very active in working with the Senate Committee on Indian Affairs on the development of amendments to the Indian Self-Determination Act of 1988. I've also served on the BIA reorganization task force committee. I served on this committee late in the initial part, when most of the work was done by the committee of the tribes, which was composed to work with the IHS people and the Bureau of Indian Affairs people.

I also am bringing to you some of my point of view from my tribe in having to work with this 638 process, from my tribe's viewpoint. I'm here to speak today to the importance of title II, the Self-Determination contracting provisions of Public Law 100-472.

The goals that you had mentioned so eloquently earlier are very important goals that were aimed at solving many of the most serious day-to-day problems we experience back home, practical problems faced by tribal governments in Self-Determination contracting. Some of the areas of concern to the tribes and, in particular to my tribe, from all of the other hearings I've been on, are either dealing with IHS or the BIA. They are a consensus of comments from all tribes, from all nations, as Donna had pointed out. Those are some of the recommendations, many of which could be implemented administratively by Secretary Babbitt.

The prior Administration did not make Self-Determination contracting a priority, so this branch of Self-Determination services continues to be buried in the BIA central office bureaucracy, under the Division of Tribal Services. By comparison, the prior Administration aggressively implemented Title III of Public Law 100-472, creating an Office of Self-Governance within the Office of the Secretary and then providing it with eight FTEs and an annual budget of $689,000. The Office of Self-Governance provides support to approximately 30 tribes. In comparison, in 1993 budgets for the branch for the Division of Tribal Services, the branch of Self-Determination Services provides support to over 500 tribal governments and Indian organizations that have Self-Determination contracts.

Our recommendation is that the Secretary of the Interior should issue a statement to the tribal government and to all levels of the department and the BIA to express his clear support for Self-Determination contracting and not only for self-government demonstration projects.

The next Assistant Secretary for Indian Affairs should require each area director to provide a monthly report on progress in Self-Determination contracting. Support for Self- Determination contracting should be the highest criteria for annual evaluations of the performance of the area director.

The branch's Self-Determination Services should be elevated to the office of the Assistant Secretary for Indian Affairs. The branch's Self-Determination Services should function as the principal advocate for tribal government Self-Determination contracting within the BIA and within the Department of the Interior. The branch should be fully funded to allow it to address the many complex problems of regulation, development, training, delegation of authority, contract support funds, and related concerns such as the office of an Inspector General, and negotiations of indirect costs.

The Secretary of the Interior should require a monthly comprehensive status report on the implementation of all stages of the 1988 amendments to The Indian Self-Determination Act. It is important to publish the draft regulations that are currently being reviewed in the Department of the Interior and the Department of Health and Human Services. Publishing the regulations in the Federal Register will provide all tribal governments with an opportunity to review the draft regulations and at that time tribes can advise the Clinton administration on whether or not the administration can use the draft as their framework for developing appropriate final regulations.

Furthermore, the Secretary of the Interior should direct each area office to sponsor meetings jointly planned with the tribal gov-

ernments and the intertribal organizations in each area to review and discuss the draft regulations. The discussions and comments of tribal government representatives at the area meetings should be recorded and made a part of the record for the consideration of the draft regulations.

There may be advocates that would call for a national meeting to discuss the proposed regulations which I've been a part of, and that is fine. However, a national meeting should be held in addition to area meetings. Not everyone who is interested can travel to national meetings because of expense or scheduling. Holding separate area meetings will ensure that a broad range of tribal government representatives have an opportunity to fully review and discuss the regulations.

The Federal Acquisition Regulations, although Public Law 100-472 defines Self-Determination contracts, cannot be procurement contracts and clarify the Federal Acquisition Regulations should not apply except to construction contracts. BIA continues to apply all of the provisions under the spirit of the FARs to Self-Determination contracting. The recommendation is that the administration should issue a clear statement to the BIA area office that Federal Acquisition Regulations do not apply to nonconstruction contracts. In addition, the area offices should clearly differentiate between procurement contracts, 638 construction contracts, and contracts to purchase goods and services for the benefit of the government, and Self-Determination contracts.

The branches of contracting should be functionally organized into two sections. One section would provide assistance to tribal Self-Determination contractors. Self-Determination would be perhaps 75 percent of the contracting branch work load. The procurement section would deal with 638 construction contracts and other 638 procurement contracts.

In some areas, the resources and the FTEs for the Self-Determination section could be transferred to the agencies along with the delegation of authority for Self-Determination contract approvals. Any delegation of authority and transfer of resources to the agencies should be done only with the full and complete participation and respect of the tribal government.

Our area also has problems in the indirect costs area. One of the most positive aspects of the 1988 amendments was the clear policy statements regarding indirect costs. Many of the functions paid for out of the indirect costs are functions required by the Federal Government.

The BIA central office in the Phoenix area has withdrawn $1.5 million of the fiscal year 1993 allocations to the Phoenix area for contract support. This is a decrease of 30 percent. If the BIA fails to pay its full share of indirect costs on 638 contracts, there will be two impacts.

No. 1, tribes that are fortunate enough to have independent revenue from trust funds or enterprises will be forced to subsidize the BIA's contract support shortfall. This will deprive tribes of funds that might otherwise be used for economic development.

No. 2, the tribes that do not have independent revenue will be forced to run a deficit in their indirect costs collection which will

create problems with their next annual audit and with their next indirect costs negotiations.

The BIA central office withdrew the 1.5 million over the objection of the Phoenix area director and without consulting the affected tribes. The intertribal council of Arizona has asked Secretary Babbitt to direct the BIA to restore the funds to the Phoenix area. The 1988 amendments were designed to prevent the problems described above.

Our recommendation is that the Secretary of the Interior should request additional funds for the office of an Inspector General to catch up on the backlog of work associated with negotiating indirect cost rates. The Secretary should also utilize the expertise and experience of the office of Inspector General in developing recommendations to improve the process of negotiating, improving, and auditing tribal indirect costs.

The Secretary of the Interior should issue a statement that declares the policy of the Department of the Interior to fully fund indirect costs associated with Self-Determination contracts as required by the Public Law 100-472. Under no circumstance should contracts support funds be withdrawn from tribal contracts in order to meet shortfalls in other program areas. The Secretary of the Interior should direct the BIA to improve the quality and availability of the annual report to the Congress on indirect costs. This report should be automatically mailed to all tribal governments.

In addition, the Secretary of Health and Human Services should require the director of the Indian Health Service to issue an annual report on Self-Determination contracting with IHS with specific attention paid to the question of indirect costs.

The Secretary of the Interior should commit the BIA to a long range effort to assist tribes to plan for assuming the control of the BIA programs using Self-Determination grants.

Training on the Indian Self-Determination Act is needed for tribes and for the BIA at all levels. There have been so many changes since the 1988 amendments that it is difficult to keep abreast of all the developments. Not only that at the area, but where it's applied from the agency level, we find that there's a lot of inconsistency. The changes include the 1988 amendments, several sets of technical amendments, the change from the letter of credit system to the 638 payment system, the Federal financial system, changes in the BIA budget categories and account codes, and the tribal budget system.

The tribes in our area recommend the Secretary of the Interior should provide funds to tribes in each of the 12 BIA areas to conduct training on all of the above areas. The $500,000 that BIA is requesting for fiscal year 1994 for the so-called Office of Program Planning should instead be given to the tribes to conduct training and to support the tribal budget system and Self-Determination.

With my tribe, it's been very difficult for me each year to subsidize these programs, even though we have a mature contract status with most of our six grants that we administer and a large majority of that is in the area of government, your law enforcement program, your judicial services program, your social services program, education, and roads.

The last 12 years that I've been with my tribal government, 8 years as tribal chairperson, I've had to come to Congress every year to ensure that the funds would be given to my tribe. I've had to subsidize, in some cases, 9 months, 6 months. This year, I think we just got our approval last month and we finally were able to draw down moneys that could have been used for other services to our tribal government in those specific areas. This year I've been informed that there will not be any indirect costs for those 638 contracts for our area.

Our tribal government has been made to be accountable year in and year out. I think the tribes are probably the most accountable people within the whole Federal bureaucracy. It just really irks me because of my own participation in all of these different task forces and the committee here today.

The one thing that I think our concern was on the committee was to ensure that once the departments within IHS and BIA have the chance to go back through and receive and review comments from the other Federal agencies within the Department of the Interior, that the tribes would equally have an opportunity to also negotiate with them on those particular recommendations that they were making that we didn't agree with.

I think one of the key things that we always kept in mind was that we didn't represent all of the other 500 tribes within the United States and that the tribes should equally have a chance to review those recommendations they were making from those departments. So, I kind of had a little bit of difficulty in saying that we wanted them published, and at the same time they needed to be published so that we knew what was really involved in those two particular documents that were finally collaborated and finally given to the tribes.

The timeframe that they're tying to crunch it into is inadequate for us to really take a look at it and to really offer critical recommendations that we have to deal with day in and day out. I hope some of the comments that I made earlier and the references give you a better idea of what we have to deal with on a day-to-day basis.

Our tribe has been trying to implement these programs, even with the burden it creates on small tribes and large tribes with little resources. I would say that most of the contracts that I know of have done a splendid job with what they've had to work with.

Given the ability to have the resources in indirect cost rates and the necessary, hopefully, increases that will come about as tribes coming together relating to the difficulty that we've had in getting the administration on both sides, IHS and BIA, to really advocate the needs of the tribes in funding areas each year and having us part of that, having that come from Indian country is one area I see where changes really need to be made.

I've seen it in the BIA task force when we've made specific recommendations and I have to admit that Dr. Brown has been an integral part of that, in trying to help us get that done. But, the cumbersome structure of the bureaucracy and just the administration itself, having different views, makes it very difficult for things to get moved on a fast track once tribal governments have a consensus on a certain area. Delegations of authority to moving things

out—I think all of these things need to be looked at as far as dealing internally in moving those positions.

Also, all of the Federal civil service status and what not, and all of those limitations—one area where we made specific recommendations and we were going to move forward, by the time we get around to changing everything that needs to be done with moving or transferring certain offices, it will be 4 years, so it's a really cumbersome effort to deal with and I just want to commend Dr. Brown at this time for sincerely trying to achieve the goals of the tribes. I Know internally and from the administration that it's been very difficult to move forward.

I thank you for this time and I appreciate being asked to be here to share our views. From the Arizona tribes and from my tribe, thank you.

[Prepared statement of Ms. Garcia appears in appendix.]

The CHAIRMAN. Thank you very much, Ms. Garcia. Mr. Roland.

STATEMENT OF BUFORD ROLIN, HEALTH ADMINISTRATOR, POARCH CREEK INDIANS, ATMORE, AL

Mr. ROLIN. Thank you and good morning Senator Inouye and members of the Senate Committee on Indian Affairs.

My name is Buford Rolin. I am a tribal member and the vice chairman of the Poarch Band of Creek Indians of Alabama.

I come before this distinguished committee to seek an answer to the question of why their continues to be a delay in the publication and implementation of regulations of the 1988 Indian Self-Determination amendments by the Department of Health and Human Services and by the Department of the Interior.

The other tribal panel members present have spoken quite eloquently and have clearly identified the collective concerns and frustrations of the tribal leaders. This continued delay impedes the full implementation of the 1988 Indian Self-Determination amendments supported by all of the tribes. The content of the latest draft regulations also reflect the unwillingness on the part of the HHS and DOI to embrace the act and their inability to proceed in good faith and earnest purpose to complete the implementation of the 638 regulations consistent with Congressional intent.

As a member of the IHS-Tribal 638 steering committee, I am deeply concerned about the substantial interdepartmental disagreements and the lack of tribal participation and consultation in the rules-making formulation. Tribal leader consultation is paramount in the implementation of the 638 amendments. Tribal leader consultation reflects true respect for the government-to-government relationship. Tribal leader participation is the cornerstone of the trust responsibility. True tribal consultation is a process by which the Federal Government recognizes the sovereignty of the Indian nations.

Presumably, BIA and IHS are concerned that by embracing the 638 contracting process, tribes would dismantle both Federal agencies and will contract for various functions at different levels of BIA and IHS, be it at the agency level, the area level, or the national level. There appears to be a reactive effort to find ways to preserve their agencies through the formulation of restrictive regu-

lations and misinterpretations of the Act, at the expense of the tribes.

Congress must act to prevent the deficiencies and ambiguity of language and insufficient explanation, and serious intrusion into the sovereignty and self-determination of tribes. The regulations being proposed are in direct conflict with the law and clearly violate the intent of Congress.

We also take issue with the way that Indian Health Service and the Bureau of Indian Affairs has handled contract support and indirect costs. Contract support costs and indirect costs are an entitlement by the law that was preserved by Congress. This is truly not happening.

IHS and BIA forced tribal contractors to bear the brunt of shortfalls in funded programs and in the administration of 638 contracts. Clearly, this was not the intent of Congress when it enacted the law. Within the United South and Eastern Tribes, $1.3 million of the documented indirect costs shortfall was for Indian Health Services alone.

Tribal contractors are now at risk in their efforts to maintain quality health care at 50 to 60 percent funded levels, compounded by not receiving adequate contract support costs and indirect costs.

Moving to the issue of Indian preference, in the proposed regulations, the agencies will solicit public comments whether the regulations should prohibit tribes from forcing instrumental requirements which give a preference to Indians on the basis of membership in or affiliation with a particular tribe. It appears that an opinion by the Department of the Interior in 1986 concluded that supplemental requirements were prohibited. DHHS questioned the DOI's interpretation of the Act's requirements regarding Indian preference.

Presently, subpart A. section 900.115, subparagraphs A, B, and C, need to be clarified to resolve the interdepartmental disagreement regarding tribal preference policies, and to avoid a serious intrusion into the sovereign determination of tribes, how to best implement the goal of Indian preference mandated by Congress.

As a matter of tribal discretion, tribal preference must supersede a general Indian preference as a tribal application of tribal sovereignty.

The last issue I would like to address, but not in its entirety, is the Federal Tort Claims Act Coverage. I support the position of tribal leaders and Indian health professionals who were in attendance in Denver for the National IHS-Tribal Consultation Conference.

Subpart 1, section 900.903, Non-Medical Federal Tort Claims Act Provisions, subparagraph A, must be rewritten, clarified, or stricken from the provisions due to ambiguity of language and insufficient explanation regarding procedures and the scope of FTCA coverage.

Finally, I would like to conclude my remarks by asking the Senate Committee of Indian Affairs to urge the DOI and DHHS to move forward with the adoption of new amendments to further the intent of Congress, as recently resubmitted to the committee through our attorneys.

Tribal leaders present in Denver are calling for real tribal consultation and the continuance of positive change in regulations. They express their displeasure in the way the regulations are formulated by DOI and DHHS, the lack of proper tribal consultation, and the failure of the agencies to interpret the law as enacted.

Priority should be given to tribes to formulate regulations that call for simplification, and less intrusive and cumbersome regulations. This was the intent of Congress in 1988. Must we wait another 5 years for this to happen?

I would also like to take this opportunity to acknowledge the support of the National Congress of American Indians, the National Tribal Leaders Forum, and the National Indian Health Board for adopting resolutions supporting our position on the 638 regulations and our call for new statutory amendments. Also, the Indian Health Service for holding 638 meetings to update tribes on the latest changes in the proposed regulations. Still, it must be noted that there has not been real consultation with the tribes since September 1991.

Thank you for the opportunity to speak and address this distinguished committee.

[Prepared statement of Mr. Rolin appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Rolin.

Chief Allen, throughout this morning we have heard the phrases "intent of Congress", "legislative intent", "Congress intended such-and-such". As one of the senior leaders of Indian country, what do you think the Congress intended when we adopted the 1988 amendments?

Mr. ALLEN. To allow the tribes to exercise their full sovereign governmental authority and to liberalize the use of the Federal resources made available for the benefit of the tribal communities. To release the bureaucratic harness.

I'd also make a point, Mr. Chairman, that in trying to accomplish that objective on the Federal side, there are no consequences for noncompliance, for not carrying out this law. If their jobs were at stake, I think the attitude of getting the job done would have been different. Their jobs can continue on and they're quite well protected.

The CHAIRMAN. There is another often used phrase, "government to government relationship"—by that do you believe that it should be the "Great White Father" and the child? Is that the relationship?

Mr. ALLEN. Absolutely not. This is a shoulder to shoulder, sovereign to sovereign status. When those treaties were made on those statutes and agreements were made between those sovereign nations, there was a relationship understanding. It was not a conquering of a greater nation over a weaker nation, it was an understanding of how we were going to live together in perpetuity and what the agreement was and what the conditions were to be understood into perpetuity. That's what we are trying to restore and preserve.

The CHAIRMAN. And when we speak of "trust relationship"—that is another phrase that is used—do we mean a powerful trustee, almighty trustee and a weak, inadequate ward?

Mr. ALLEN. In my judgment, no. In the beginning, I think they felt that there was a need to preserve and protect the resources that were preserved by the tribal nations, but today that trust is now a basis to abuse, misuse, and continue to control. It should be only for the purpose of protecting any encroachment or erosion of our sovereignty or our resources or all that is entitled to the tribal nations and their communities.

The CHAIRMAN. I think it is well that we remind ourselves of what we intended and I will read into the record the Congressional declaration of policy which sets forth the intent of the Congress of the United States.

This was adopted by both Houses and signed by the President of the United States.

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to individual Indian tribes and to the Indian people as a whole, through the establishment of a meaningful Indian Self-Determination Policy which will permit an orderly transition from the Federal domination of programs for and services to Indians, to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments capable of administering quality programs and developing the economies of their respective communities.

Do you believe that we have been living up to the declaration of policy as enunciated by the Congress of the United States, and approved by the President of the United States?

Mr. ALLEN. Unfortunately, no. If you look at what our experiences are, if you come to our reservations—I know you have—and if more would come to our reservations and see the status and conditions of our people, the plights that we're fighting, absolutely not.

The CHAIRMAN. Do any of you disagree with Chairman Allen?

[All shake heads "no".]

The CHAIRMAN. We are now being told that it may take a few more months. For example, I have here an analysis that I have gleaned from the pages,

Submission to OMB would take another 1 or 2 months, or maybe 3 months. The OMB would have to look into this and that might take another 3 months. This is expeditiously. The Congress will then have 1 month to review the approved proposed regulations prior to its publication and then it will be published in the Federal Register for a minimum of 3 months.

So you will have at least 9 more months. Would you be satisfied if the regulations are published within 9 months?

Mr. ALLEN. After waiting for almost half a decade, the answer is yes. At least it would give us something to build on. We know that the current status isn't what we want and it isn't what's appropriate, but we will build on it and continue to seek the support of Congress to steer the Administration onto the correct path of implementing this relationship. It's better than nothing.

The CHAIRMAN. I thank you all very much.

Mr. ALLEN. Thank you, Mr. Chairman.

The CHAIRMAN. For the second panel, we would like to call upon Lloyd Benton Miller, member of the firm of Sonosky, Chambers, Sachse, and Endreson of Anchorage, AK; Bobo Dean, member of the law firm of Hobbs, Straus, Dean, and Wilder of Washington,

DC; and Britt Clapham, Senior Assistant Attorney General, Department of Justice, Navajo Nation, Window Rock, AZ.

Mr. Miller.

STATEMENT OF LLOYD BENTON MILLER, ATTORNEY-AT-LAW, SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON, ANCHORAGE, AK AND SONOSKY, CHAMBERS, SACHSE, & ENDRESON, WASHINGTON, DC

Mr. MILLER. Good morning, Mr. Chairman, members of the committee, and distinguished staff.

My name is Lloyd Miller and I am a partner in the law firm of Sonosky, Chambers, Sachse, Miller and Munson. Our firm represents a wide coalition of tribes, tribal organizations, area Indian health boards and other area boards, and national tribal organizations in matters relating to regulatory implementation of the Indian Self-Determination Act amendments of 1988.

I have submitted to the committee written testimony and several attachments which I will not read into the record.

The testimony details, at length, the tremendous efforts which tribal governments have engaged in in order to secure a place at the table to participate in the regulatory development process. It has been an ambitious effort that has taken thousands of hours of the three lawyers that you see before you, and the panel before us, and hundreds of tribal participants behind them.

In April 1989, we produced what we felt was a joint Federal-Tribal draft. What happened after that surprised us. In December of that year, the Federal Government came back with a unilateral draft developed in secret without any tribal participation. In response to protests from this committee and from tribal communities around the country, we went back to the table. We attempted to renegotiate a new draft and in September 1990, a new draft was issued, a joint Federal-tribal draft. Then the Federal agencies turned their backs on us again and 2½ years later, in secret, produced a new unilateral Federal Government draft regulation. This is not the type of active tribal participation your committee envisioned and that the Congress envisioned when it enacted the 1988 amendments. Indeed, we ask ourselves many times what the point is of the tribal participation we engage in when the result is the poor quality reflected in the January and February 1993, draft.

My written testimony also details the foot dragging which has occurred by the agencies, and I would like to remind the committee of some of the high points in this regard.

It took almost 1 year for IHS and BIA to simply agree to work together, as indicated in the joint letter which was signed by the Assistant Secretary and the Indian Health Service Director—1 year longer than the entire statutory 10-month regulatory development process.

It took 2 years before all of the other sister agencies within the Department of the Interior were directed by Secretary Lujan to participate in the regulatory development process. For 2 years, they resisted any participation at all.

It took 3 years for the two departments to issue their own separate forms of regulations and, as you now know, 4½ years before

they issued joint regulations. And still, it will be 9 months more until publication, as the Chairman indicated and, in all likelihood, another 6 or 8 months after that before final promulgation of the rules following the receipt of notice and comment, the receipt of comments from Indian country, further clearance from both departments and the Office of Management and Budget.

Where has all this time led us? I have attached to the original copy of my committee a copy of a 400-page regulation.

Mr. Chairman, we submit that this is not the simplification effort—that is the word used by this committee in the report in 1988. Instead, this 400-page document, in excruciating detail, would regulate every aspect of tribal contracting, from property management, financial management, program standards, and on and on. It is not an example of liberalization. It is worth pausing here and noting that under title III of the same statute, under the title III Self-Governance Demonstration Project, compacts have been issued to nearly 30 tribes now, without any regulations whatsoever—through an office of Self-Governance which is not within the BIA, but above the BIA, in the office of the Secretary.

In the 28-page report attached to my testimony, I have analyzed the draft regulation issued in January 1993. Mr. Dean has also submitted a copy to committee staff prior to this hearing. Let me briefly review for you some of the problems with the draft—I will address four items and my colleagues will address the others.

The draft regulation is now a document which would exempt huge portions of these Federal agencies, different bureaus in the Interior Department, from any contracting at all. Again, notwithstanding the contracting of those very same programs under title III compacts.

It is a document which would deny appeal rights and procedural due process for key critical issues involving of funding of contracts under the Indian Self-Determination Act.

It is a document which, in the program division section, seeks to pit tribe against tribe.

It is a document which, in effect, will prohibit any redesign of programs contracted over to tribes due to the imposition of program standards in subparts N and O.

It is a document which will continue to deny, and actually sets up a framework for guaranteed denial of, full contract support costs to tribal governments.

It is a document which excessively regulates construction contracts.

It is a document which retains complex property management systems, and a document which permits the agencies to unilaterally cut off contracts entirely outside the reassumption procedures set up in section 109 of the act.

Mr. DEAN AND MR. Clapham are going to discuss several of the issues I've just itemized. I would like to address four of them briefly for the committee; the issues of contractibility, of divisibility, of indirect costs—an issue you've already heard some about—and contract suspension.

Perhaps nothing is more at the core of the act than the issue of contractibility. What is contractible? The Congress was very clear: Everything is contractible. All aspects of Indian programs are con-

tractible. This committee, in the 1988 report, said "We mean it—we mean at the service unit level and the agency level, at the area office level, at the headquarters level", and indeed in title III compacting the Department of the Interior is going forward and contracting at all levels. But when it comes to title II, and it's the same law which governs the scope of contracting, they behave differently and they seek to cut off vast areas of the Federal bureaucracy, virtually all of headquarters, most area offices, and even significant portions of service units and agencies.

Now, they do this through use of the term "operation of services". I cannot find, in your committee report, nor in the House report, nor in the language of the statute, where this committee said, "Only the operation of services in the field or the service delivery field programs are contractible." That's not what this Congress said, but that is what you will hear from the departments, that is what you will see in the February draft. They, in fact, go so far as to say that no trust responsibility program involving the exercise of discretion is contractible.

But I really have to ask them, what are health programs, but a demonstration of the Federal Government's continued trust responsibility to Indian people? What are the Bureau of Indian Affairs programs? What are the Indian programs administered by MMS, BLM, and Bureau of Reclamation, but expressions of the trust responsibility? If trust programs really were not contractible at all, I wonder how we have managed to contract nearly $1 billion in contracts since 1975.

No; these are provisions designed to permit the agencies the discretion to deny contracts if and when they feel like doing so. But they also will have a deeper affect on tribes. Mr. Chairman, when a tribe goes in to operate a program, it needs warehouse functions, purchasing functions, financial management functions, personnel management functions—the ordinary administrative support in order to run the programs, not just paying the salary of a community health representative or an alcohol counselor or a police officer.

What we find with the bureaus and the Indian Health Service over the years, something which we thought Congress had corrected in 1988, is that they retain all of those supported functions which they have and tell the tribes, "You go out and get contract support costs." This drives a huge need for contract support costs, which of course Congress is unable to fund. The bureaus keep these functions, although they no longer have the programs, and their bureaucracy is, accordingly, never reduced. As your Senate report eloquently stated in 1988, the bureaucracies have grown, not been reduced, and it is because, you said correctly, of the failure to turn over administrative segments of the Indian programs.

The next issue I would like to address very briefly is indirect costs. You have already heard a considerable amount about indirect costs. It is at the core of funding. What happens when a tribe doesn't have enough money to run its accounting office, because it has insufficient costs, is very simple: They do not shut down their accounting office. They are required by Federal law to comply with the requirements of the Single Agency Audit Act. They run that accounting office. And where do they get money for it? They lay off

a police officer, they lay off a CHR, they lay off a CHA. You heard Mr. Peltola talk about 40 layoffs in order to maintain their administrative structure, so large is their contract and so deep is their indirect cost shortfall.

That is what happens when indirect costs and contract support costs are not fully funded. And, the problem is even worse—the agencies still today, despite specific legislation on this point, refuse to acknowledge the need for indirect cost funding from other departments which do not provide full funding. For instance, HUD only pays 15 percent—a tribe's negotiated rate may be 18, 19, or 20 percent.

This committee said that the departments are to report to you on the shortfalls so that Congress would have the opportunity to appropriate additional funds, if available, to meet the shortfall. They won't do that. They have insisted they will not do that.

The third issue I'd like to discuss is divisibility. Divisibility is an interesting concept and, I might add, like contractibility in the old regulations, between 1975 and 1988 there was no section called "comtractibility". Similarly, in the old regulations there was no section called "program divisibility".

It is an interesting remark I make because the 1988 amendments were designed to liberalize contracting under the Indian Self-Determination Act. It was actually designed to expand contracting, not contract it. It was designed to remove barriers, not erect them. Now that the agencies have the opportunity to write new regulations, they are taking the opportunity to move in the opposite direction and actually restrict contracting further than it was before the 1988 amendments. One wonders if perhaps you should have never enacted the 1988 amendments so that we would not have been facing agencies now so determine on enacting regulations that are worse than the regulations on the books before the 1988 amendments were enacted.

The divisibility issue represents an area in which the agencies seek to pit one tribe against another, and they would deny a contract to a tribe seeking to exercise its sovereign right to run its own programs if the agency believes that the contract might have an impact on the agencies' own abilities to serve another tribe.

In title III compacting, this issue has come up. Never has a compact been denied. How has it been handled? I believe Mr. Lavelle has been before this committee. They retain residuals, they have impact funds, and they also have the ability to restructure their own bureaucracy to make sure there is no damage to neighboring tribes when a compact is issued for this tribe. Never before was the concept of program division a basis for denying a contract, and indeed in 20 years a contract has never been denied.

Now, the agencies come forward, they want a provision in, they want a basis for denying contracts.

Last, Mr. Chairman, the issue of contract suspension. You went to considerable lengths in the Senate report, the committee did, to discuss the need for the agencies to cease and desist from intervening in tribal affairs, to allow tribes to run their programs as they deem best. But, you also recognized that it is possible—tribes are accountable, they are responsible—but it is a human system and it is possible that at times gross mismanagement would occur. If so,

or if it were alleged, a contract could be involuntarily taken back. You provided in section 109 for a procedure with constitutional due process: Notice, opportunity for a hearing, in cases of an emergency a hearing after the fact but a hearing nonetheless, all under the requirements of the Administrative Procedures Act. What did we find in the new regulations that we never found in the old regulations? The agencies now want the right to suspend the contract if they feel their trust responsibility is somehow being, and this is the word, "impaired". They want the right to suspend payments under a contract if they believe there was any deviation from the requirements of the 400 pages of regulations. That, Mr. Chairman, is not a step forward, but a giant step backward.

My colleagues will be addressing other issues that have arisen in connection with the report.

I would like to conclude with these remarks. We have been frustrated over the last 4½ years. We anticipate a good 2 more years. We wish that we had begun with an administration that could have elevated the issue high enough within the departments to give it the visibility it needed. That did not happen. We have become frustrated enough and distrustful enough with the bureaucracy which really drives it, and not the Eddie Browns and Mike Lincolns of the world, to insist upon further statutory amendments. We have proposed, and I have attached it to my testimony, a package of proposed amendments, together with an explanation. As Mr. Rolin testified, these amendments have been endorsed by the National Indian Health Board, the National Congress of American Indians, the National Tribal Leaders Forum, the BIA Reorganization Task Force, and the Native American Transition Team working with President Clinton since January.

Thank you, Your Honor.

[Prepared statement of Mr. Miller appears in appendix.]

STATEMENT OF BOBO DEAN, ATTORNEY-AT-LAW, HOBBS, STRAUS, DEAN & WILDER, WASHINGTON, DC

Mr. DEAN. Mr. Chairman, my name is Bobo Dean. I'm with the law firm of Hobbs, Straus, Dean, and Wilder of Washington, DC and Portland, OR.

I very much appreciate the invitation to testify at this hearing. I present this testimony on behalf of a number of Indian tribes and tribal organizations which our firm has represented during the process of consultation which took place in the early period after 1988, before the cutoff of consultation in 1991, including the Miccosukee Tribe of Indians of Florida, the Menominee Indian Tribe of Wisconsin, the Seminole Tribe of Florida, the Mississippi Band of Choctaw Indians, the Metlakatla Indian Community, the Bristol Bay Area Health Corporation, the Norton Sound Health Corporation, and the Maniilaq Association.

I would like to say that I believe that from listening to the testimony of the first panel that our clients would agree with everything that has been said. I also would say that I concur with the comments Mr. Miller has presented and I fully expect to concur in the comments Mr. Clapham will present.

I would like to address three areas in the proposed regulations as illustrations of the deficiencies in the approach taken in the proposed regulations and in particular, curiously, situations in which the opportunity to issue new regulations have been used by the agencies not to further the goals clearly stated, and eloquently repeated Senator, by you, a few minutes ago, but to initiate their effort to correct what they may have perceived as problems in their relationships with the tribes under the Indian Self-Determination Act, as originally enacted.

The first area that I would like to discuss briefly has to do with the requirements for a declination appeal. Section 102 of the act, requiring the Secretary, if he does not approve a contract proposal, to decline it, to provide a notice of the reasons he is declining it and to provide an appeal and a hearing to Indian tribes whose contract proposals are declined.

It was a very unique feature of the legislation when it was originally enacted in 1975. I don't know of other situations in which an entity has been granted a right to have a contract with the United States which must be issued unless the agency with whom that contract is to be negotiated can sustain and justify, under statutory standards, its refusal to contract. It's a critical part of the legislation. The original bill, before its enactment in 1975, merely authorized contracting with tribes, but as a result of testimony from the Ramah Navajo School Board, which was on the panel earlier, before 1975 the word "direct" was included and the declination procedure was included in the legislation.

The agencies have taken the position that if a proposal is not approved because the tribe has proposed a budget in a contract amount which they believe to be the amount which they are entitled to under section 106 of the act, which establishes statutory standards for determining the contract amount and that amount is greater than the agency or the area director, in most instances, considers to be available, the agency is not required by the act to decline the proposal, to provide a notice of deficiencies, to provide technical assistance to overcome the deficiencies and, most importantly, to provide an appeal and a hearing.

Their position has been that that is not a declination. They are perfectly prepared to approve the proposal, but they would approve it at a different level of funding, at a lower amount of funding than the amount that the tribe has requested. That has been an issue throughout the consultation with tribes and both agencies have made, I think, some attempts to reach a compromise.

The Department of the Interior's position now, in the proposed regulations, is that while this is not a declination, they will provide substantially the same right of an appeal to a board above the level of the BIA, and a hearing before an administrative law judge. They have compromised to the point that the issue is moot, but they're doing it as a matter of grace—in their view, the law does not require it.

The Indian Health Service, on the other hand, has also provided for an appeal if they get a proposal which says that the amount that you've got available to operate, let's say, the Mount Edgecombe Hospital, is x dollars, the agency believes that it's $400,000 less, which is an actual situation which occurred some years age,

an appeal to review the funding level would be provided but it would be to a board appointed by the IHS director and the final decision, unlike the circumstances of a declination appeal, would be made by the IHS director and no official in the Department of Health and Human Services above the level of the IHS director would be permitted to review that funding determination.

We do not fully understand why the Indian Health Service has kept to that position, but it seems to us that it is entirely inconsistent with the provisions of the Act, with statements in the report of this committee, which is the principal legislative history on the Act, which directed that the agencies have no alternative but to either approve a contract proposal or to disapprove it and provide the hearing before an administrative law judge.

Second, we note that with respect to the internal agency program guidelines in the existing regulations of the Bureau of Indian Affairs under 638, there is a specific provision that inconsistencies between tribal program plans and designs for contract operation of Bureau programs, on the one hand and Bureau manuals, guidelines, or other procedures that are appropriate to programs or parts of programs that are operated by the Bureau, are not grounds for declination.

The report of this committee on the bill which became the 1988 amendments clearly indicates the intent of Congress to encourage the flexibility of tribes to redesign programs. The agencies, however, have removed that provision from the regulations and the Interior regulations provide that tribal proposals must adhere to all regulations, orders, policies, agency manuals, guidelines, industry standards, and personnel qualifications to the extent that they have actually been observed by the Federal agency. There's an opportunity for the tribe to request a variance, but it is within the discretion of the agency to grant or deny that variance.

With respect to the Indian Health Service regulations, in the course of the tribal consultations, it was proposed that if a hospital or other health facility met, or the tribal contractor gave an assurance that it would meet, the standards on the Joint Commission of Accreditation of Health Organizations, or the standards of the Health Care Finance Administration of the Federal Government, that assurance by itself would replace the 30 or 40 pages of detailed scope of work which have typically been used by the Indian Health Service for inclusion as the terms of contracts with tribal organizations to operate hospitals, so as to simplify the contract. As long as the accreditation by JCHO was assured and maintained, it would not be necessary to negotiate a detailed scope of work.

As the regulations have emerged, there is now a provision for the tribal contractor or the tribe proposing to contract to a hospital, to give an assurance that it will meet those standards and there is no alternative. The implication is, although the agencies may not have intended this, that a requirement to contract a hospital is meeting JCHO or HCFA standards.

There are a number of provisions in subpart D relating to financial management in which the agencies have retreated in the 1993 regulations from the agreements which had been reached in the process of consultation and reflected in the last draft of the regulations. I will note in particular that tribal representatives fought for

and obtained in the last draft special cost principles that they felt, and the agencies apparently felt at that time, were appropriate because of the purposes of this legislation which differentiated from the OMB promulgated cost principles that are generally applicable to Federal financial assistance.

In some instances, the OMB circulars on cost principles present no problem. In other instances, tribes felt that those cost principles, whether they are the ones that apply to State governments or to private nonprofit organizations, were not appropriate because of the unique relationship between tribes and the Federal Government and the purposes of this Act. We have attached a list of some of those provisions from which the agencies have retreated to our written statement.

In conclusion, Senator, I would like to supplement what has already been said about our experience in the consultation process. I think it is difficult to explain why tribes have had the problems which they have had. I recall an incident in which in the course of discussion over provisions of the regulations, one of the Federal representatives said, "What we're trying to do here is create a level playing field." That was a very common and familiar expression during the 1980's. For a while I could not figure out what he was talking about and then it sank in on me, as the discussion went on, that he was talking about a level playing field between the tribes, on the one hand, and the Federal bureaucracy on the other. That does not seem to me to be the purpose that Congress had when it enacted this legislation in 1988, and I would join in the request of the first panel that this Committee consider amendments and perhaps dialogue with the respective Secretaries to encourage the full implementation of the goals of this legislation. Thank you.

[Prepared statement of Mr. Dean appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Dean.

Mr. Clapham.

STATEMENT OF BRITT CLAPHAM, SENIOR ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, NAVAJO NATION, WINDOW ROCK, AZ

Mr. CLAPHAM. Mr. Chairman, members of the committee, my name is Britt Clapham and I'm the Senior Assistant Attorney General with the Navajo Nation Department of Justice in Window Rock, AZ.

I'm here today on behalf of the Navajo Nation and I would like to clarify that my testimony has been viewed and approved by the intergovernmental relations committee of the Navajo Nation council.

As a bit of background, from 1985 until the present time, I've been involved in the representation of clients both with the Navajo Nation and the Tohono O'odham Nation for a 2-year period of time, who are contractors pursuant to Public Law 93-638. Among those clients has been the single largest 638 contractor in the Nation and that's the Navajo Nation Social Services Department.

I've been involved in the development of these regulations as my copanelists have and during that time I've experienced many of the problems that they have noted before you.

Today I'd like to speak and focus on three specific issues. The issue of Indian preference in employment and contracting, the scope of construction contracting as it's related to subpart J of the proposed regulations, and then trust resource program contracting and trust responsibility.

Mr. Rolin, in the first panel, pointed out the concerns that tribes have about Indian preference hiring versus tribally-affiliated preference. This is of particular concern to the Navajo Nation due to the fact that the Navajo Nation has adopted statutes of its own which create tribally-affiliated preference in both the employment and the contacting areas. It's interesting, in reading the preamble, that there's an interdepartmental dispute between the Department of the Interior and the Department of Health and Human Services. The Department of Health and Human Services appears to agree with tribes, that tribally-affiliated preference is appropriate while, on the other hand, the Department of the Interior does not. It's unfortunate that this interdepartmental dispute gets resolved in a way that undermines tribal sovereignty, self-determination in contracting, and the development of tribal economies.

It was you, Mr. Chairman, who pointed out earlier today in reading the policy statement, that the purposes behind the act are quite clear; to foster the development of strong and stable tribal self-governance and to enhance the ability of tribes to develop their reservation economies. These two programs, the tribally-affiliated preference in hiring and contracting, are central to both of those points. Nothing is more central to self-government than a tribe being allowed to hire its own members to operate the governmental programs in question. The same is true with regard to the economic aspects when the tribe chooses to contract with businesses and entities on the reservation, owned and operated by its tribal members, to ensure the economic development of those tribal members and to retain tribal dollars on the reservation.

In reviewing the material presented by Interior in the regulations, it appears that these decisions have been made based on the opinions of the Office of the Solicitor of the Department of the Interior. When you review those opinions it becomes clear that they have never looked at or analyzed their opinions based on the purposes of Public Law 93-638. Moreover, a close review shows that they rely on regulations that are not even applicable to Public Law 93-638 contracts. They are regulations applicable to other contracting that the DOI does but specifically exempts Indian Self-Determination Act contracts.

For these reasons we feel that this portion of the regulation needs to be revised to allow and assist tribes in the development of tribally-affiliated preferences. Throughout the past four years, this matter has been discussed over and over in the regulation development process. It wasn't until March of this year that we found out, when we met with folks from DOI and DHHS, that they had made this shift in policy. Earlier versions of the draft regulations contained the tribally-affiliated preference that we seek.

For those reasons, we strongly urge that the regulations be revise to reflect and incorporate aspects of tribally-affiliated preference programs.

One final point that I want to make is that the opinions of the Solicitor talk in terms of Title VII of the Civil Rights Act of 1964. As a point of clarification, that act exempts tribes from its coverage and I think that's important to understand.

Moving on to the scope of subpart J, which is the subpart of the regulations which deals with construction contracts, you will recall, and others have mentioned this morning, that this is the one remaining area of 638 contracting which is subject to the Federal Acquisition Regulations. The scope of this subpart needs to be revised to exclude several of the ongoing programs operated by the BIA; the Housing Improvement Program, for one, and the Roads Maintenance and Construction Program for another.

It appears to me that, in reviewing this section, that this problem has been created because of multiple definitions found within the act, the regulations, and the definition of the scope in the proposed subsection 900.101. That scope focuses on the construction of project type construction, Federal facilities, tribal facilities, rather than ongoing program construction such as the Roads Maintenance and Construction Program or the Housing Improvement Program.

In order to avoid overburdening tribes with the Federal Acquisition Regulations and the process of waiving these regulations in the contracting aspects and to make it clear to contracting officers who implement these programs, we would encourage that this section be revised. In order to ensure that it's revised clearly, our recommendation is to amend the section of the statute which defines construction programs. Mr. Miller mentioned earlier his set of amendments, and such an amendment is included in the package that he has submitted to the committee.

Finally, in the area of trust program contracting and trust responsibility, a few minutes ago Mr. Miller mentioned the concerns with contractibility and its relationship to trust functions and trust responsibility. When one reads that section in conjunction with provisions of subpart B of the act, it becomes clear that there is a good deal of confusion in these regulations relating to trust function and trust responsibility.

One provision requires disclosure of any conflicts of interest between a contractor and a program beneficiary. That term "program beneficiary" is nowhere defined in the act. In the declination section itself, the Secretary is required to decline a contract or trust program when there is an unresolved conflict of interest between the contractor submitting the proposal and the "beneficial owner of the trust resource." As we're talking about beneficiaries of programs and beneficiaries of the trust, it seems quite confusing.

This is particularly problematic from the Navajo Nation's view when we talk about contracting functions by those agencies within the Department of the Interior, outside the Bureau of Indian Affairs. It's been our experience that Bureau of Land Management, Bureau of Reclamation, the Minerals Management Service, and the Fish and Wildlife Service are amongst the agencies that are the first to deny that they're covered by any trust responsibility and now appear wanting to rely upon the trust responsibility to deny contracts when tribes seek to contract portions of their programs. Many of the BOR's water projects encompass situation where you have both Indian and non-Indian beneficiaries. Our concern is that

the imprecise language of program beneficiary versus the trust beneficiary will likely be confused by these non-BIA agencies within Interior and therefore may be used to frustrate the contracts.

It's further interesting to point out, as others have, the backsliding that occurs. Under the current regulations dealing with trust program contracting, the conflict of interest issue that I noted before is required to be disclosed in the proposal. In the new regulation, in response to the intent of Congress to open up and make more liberal the contracting, we have a requirement that requires the declination of a contract where there is a conflict of interest.

It seems to me that the trust responsibility exists not as a basis of declination in this instance. It's true that there are multiple beneficiaries of the trust responsibility in many situations and that may make the trustee's job more difficult, but it should not be the basis of a declination of a contract. It should be looked at as the statute provides and whether the trust resource is protected.

Finally, in closing, the Navajo Nation, as others have, would urge that further amendments be considered. I've mentioned Mr. Miller's submission. The reason that we say that this is needed at this point in time is that tribes and tribal organizations quite simply have not received the benefits of the 1988 amendments. During my tenure with the Tohono O'odham Nation, I attempted to appeal a declination and that matter was dismissed by the administrative law judge because there's no regulation to appeal from that are applicable to the Bureau of Reclamation. But despite the fact that amendments have occurred, we cannot effectively enforce our rights through the administrative appeal process.

The other point that has been raised is the importance of tribal participation in the development of these regulations. At this point, 55 months have passed since the Act was adopted in October 1988. During that period of time when there has been three-way participation, and by three-way I mean tribal representatives, DOI representatives, and DHHS representatives, this process has moved forward. During the periods of time when the Federal agencies have operated without tribal participation, it hasn't. Quite frankly, 37 months of the 55 months are periods when there has been little or no participation by tribes, when the two agencies have been operating without tribal activity. Only 18 months have involved active tribal participation.

With that, I conclude my comments and thank the committee for the opportunity presented today.

[Prepared statement of Mr. Clapham appears in appendix.]

The CHAIRMAN. Thank you very much.

I have so many questions that I do not know where to start, but let us start with numbers.

The draft regulations to implement the 1988 amendments consist of more than 400 pages. Is that correct?

Mr. MILLER. That's correct.

The CHAIRMAN. How many pages?

Mr. MILLER. It's 398 pages, plus an additional table which I think is about 30 pages long.

The CHAIRMAN. Do you know how many pages were in the 1975 bill and regulations to implement that?

Mr. MILLER. Less than one dozen pages in the code of Federal regulations.

The CHAIRMAN. So, we need 400 pages to improve the 12 pages?

Mr. MILLER. That appears to be the opinion of the departments.

The CHAIRMAN. Do you believe it was the intent of the Congress of the United States to simplify the process?

Mr. MILLER. Absolutely.

The CHAIRMAN. To expedite the process?

Mr. MILLER. Absolutely.

The CHAIRMAN. To cut down on paperwork?

Mr. MILLER. Yes.

The CHAIRMAN. If that is the case, do you believe that the Government of the United States is deliberately disregarding the intent of the Congress of the United States and frustrating Congressional policy?

Mr. MILLER. Your Honor—I'm so used to saying "Your Honor", I'm in court so often—Mr. Chairman, after noting that it's difficult to make such a statement, I must agree. the Government is defying the will of Congress and it is doing so for various reasons, most notably to preserve their own bureaucracies from being dismantled by the tribes, lest the tribes grasp their own future and their own destiny.

The CHAIRMAN. Do you believe that the Government of the United States is of the belief that Indians are unqualified, incapable, and unprepared to handle their own affairs?

Mr. MILLER. I certainly believe that the mid-level bureaucracy that has driven the regulation drafting process firmly has that view. I do not believe that that's the view of the former Assistant Secretary, Dr. Brown, or former or current directors of the Indian Health Service, but I'm firmly of the belief that from everything we have seen over five years of often intimate work with these ladies and gentlemen, that that is their point of view, by and large.

The CHAIRMAN. Was it easier to do business in contracting before 1988 than after 1988?

Mr. MILLER. Ironically, it was.

The CHAIRMAN. Your amendments, the ones that you are proposing, would assume that there would be no regulations, is that correct?

Mr. MILLER. We know that there must be regulations sometimes.

The CHAIRMAN. The ones that are now drafted.

Mr. MILLER. The statutory amendments that we have proposed would put into law provisions that we may have to wait two years to see and even then may not see if the current draft prevails. Our hope is to see put into statute provisions which become effective immediately, some retroactively, so that the promise of the statute is not lost.

The CHAIRMAN. What level of input did Indian country provide in the drafting of this 398-plus-30-page regulations?

Mr. MILLER. None, Your Honor. That draft was prepared over the past 2½ years and there has been no tribal involvement in the preparation of that draft.

The CHAIRMAN. When was the first time Indian country saw this?

Mr. MILLER. In January 1993, when it was released by the departments.

The CHAIRMAN. Before that, you had no idea what was in it?

Mr. MILLER. No, Mr. Chairman.

The CHAIRMAN. In negotiating with the Government of the United States, do you find that it is a process where the Government of the United States tells Indian country, "This is the way it is going to be done, you take it or lump it"?

Mr. MILLER. Absolutely, that has been the experience in this regulatory process. It has been particularly unfortunate because we have periods in which we are dealing, we believe, in good faith with our counterparts—let's sit down, let's negotiate, we produce drafts. As I indicated earlier, we produced two joint drafts with many compromises in those drafts—we were willing to give here in order to get over there-only to be followed by a unilateral document with the Government telling us how it's going to be.

The CHAIRMAN. So it is not good faith negotiating or good faith contracting in the sense that we understand it in the general American community?

Mr. MILLER. Certainly not, Mr. Chairman.

The CHAIRMAN. Are you also suggesting that the Government of the United States, though it says often that they believe in the trust relationship and the government-to-government relationship and the sovereignty of Indian nations, that it is all rhetoric?

Mr. MILLER. Well, in this instance, they are unwilling to turn over their programs freely. It is both to preserve their bureaucracies and out of a patronizing attitude toward the ability of tribal governments and tribal consortia to do for themselves.

The CHAIRMAN. I can assure you that, as a Member of the Congress of the United States, it is frustrating when we spend time to draft a law and to find it deliberately disregarded.

I thank you all very much.

Mr. MILLER. Thank you, Mr. Chairman.

The CHAIRMAN. And now may I call upon the Assistant Secretary for Indian Affairs, Department of the Interior, Dr. Eddie Brown, and the Acting Director of the Indian Health Service, Dr. Mike Lincoln.

Dr. BROWN AND DR. Lincoln, welcome.

Dr. Brown, please.

STATEMENT OF EDDIE F. BROWN, ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY JIM THOMAS, DIVISION OF INDIAN SELF-DETERMINATION SERVICES; GEORGE SKIBINE, DIVISION OF INDIAN AFFAIRS; AND WILLIAM SINCLAIR, OFFICE OF SELF-GOVERNANCE

Mr. BROWN. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to be here to discuss the proposed regulations to implement the 1988 amendments to the Indian Self-Determination Act.

I have with me this morning Jim Thomas, acting chief of the Division of Indian Self-Determination Services as well as George Skibine, attorney and advisor from the Office of the Solicitor of the

Division of Indian Affairs, as well as William Sinclair, who is the compact negotiator for the Office of Self-Governance, to assist in any questions that may come later.

I'd like to summarize my statement and ask that the full text of my statement be made a part of the record.

The CHAIRMAN. Without objection, your prepared statement will appear in the record.

Mr. BROWN. Let me begin by saying that it was about 3 years and 10 months ago that I appeared before a Senate committee for my confirmation and indicated that one of my highest priorities as Assistant Secretary would be not only the development of regulations, but the publication of those regulations on Self-Determination.

As we've heard this morning, we've heard a lot of frustration on behalf of not only tribal people but of their legal representatives as well. I think what you'll also hear is some of the frustration that we've gone through as well as frustration about how we begin to move the development of regulations. I have not been able to compare to anything like this in the Federal Government not only for the Bureau of Indian Affairs, but regulations that pertain to every bureau within the Department of the Interior. But then also to coordinate and integrate and jointly, in a partnership, and develop it across two departments.

I think when one begins to see the enormity of that task, actually having been involved in that attempt over the last 3 years and 10 months, that it requires. And any production that will come out of that will certainly reflect compromises, compromises at each level, the tribal and the bureau and the various other bureaus within the Department of the Interior, and then with the Department of Health an Human Services.

I've yet to find anyone that has reviewed that draft that said this draft is great and has everything we want in it. So, I think right off the bat, I need to say that this has been a series of compromises where we have tried, in a very serious attempt, to include people's comments and input and then come out with a document that somehow reflects the needs and addresses those concerns at each level. Whether or not we have been successful at that will surely be the reactions of individuals here in the next few months.

We have attempted, as I said, to clarify, streamline, and improve the process of transition from Federal domination of programs to tribal control by eliminating burdensome regulations and reducing the cost of tribal contractors.

The 1988 amendments expanded contract authority in a number of significant areas and expanded the scope of contract authority to encompass other bureaus and offices within the Department of the Interior, in addition to the Bureau of Indian Affairs. The 1988 act further provided that all requirements placed on Indian contractors be addressed in regulations and that Indians participate in the drafting of these regulations.

In the spirit of self-determination, the Indian Health Service and the Bureau of Indian Affairs, I believe, have taken extraordinary measures to seek and include the recommendations not only of Indian people, but the various other bureaus that are involved in drafting these regulations.

The Bureau of Indian Affairs and the Indian Health Service held meetings in various cities to discuss the 1988 amendments with tribal representatives. Nationally, over 1,200 people attended these joint sessions. Two joint drafting workshops were held and produced a working document.

In October 1989, a joint letter was issued to announce the decision to develop joint regulations by the two agencies. A preliminary set of draft regulations was released for tribal comment. In 1990, 13 regional consultations were held with tribal representatives to discuss the joint regulations and to collect tribal comments.

A coordination work group composed of tribal representatives and agency staff was formed in March 1990. This group met periodically and in September 1990 issued a new set of draft regulations. Throughout the following year, each department conducted preliminary reviews and clearance of the draft regulations. In December 1990, the Secretary of the Department of the Interior set forth the department review and clearance process, including a review by the departmental review team. A departmental policy group also reviewed the draft regulations for the resolution of certain issues.

A negotiating team appointed by each department met to negotiate final drafts. These meetings continued throughout the summer and the joint regulation was completed in October 1992. When I first started that process, people said we would never have gotten to that point.

In December 1992, the final draft was submitted to the Office of Management and Budget for review and approval prior to the publication in the Federal Register. Because of the change in administration, the proposed rule was returned to the department to allow the new administration an opportunity to review it.

While we recognize that these have been a long time in development, their significance requires that they not be published as proposed policy without a careful review by the new administration. The department intends, however, to expedite the process to the greatest extent possible.

This concludes my summary and we will be happy, Mr. Chairman and members of the committee, to answer any questions that you might have.

[Prepared statement of Mr. Brown appears in appendix.]

The CHAIRMAN. Thank you very much, Dr. Brown.

You indicated in your first paragraph that you wanted to eliminate burdensome regulations and then you spoke of the law requiring participation by Indian country and the drafting of regulations. You cited a chronology of 1988, 1989, 1990, but nothing happened after 1990, is that correct?

Mr. BROWN. No, sir; that is not correct.

The CHAIRMAN. You had negotiations among yourselves?

Mr. BROWN. Yes, sir; if I can explain—

The CHAIRMAN. Second, if I may continue my thoughts here. The regulations that we see before us today, the 428-page regulation, is a new set of regulations. It hardly reflects the input of Indian country. Is that correct?

Mr. BROWN. No, sir; that is not correct.

The CHAIRMAN. Tell me how.

Mr. BROWN. Okay. Let me say that there were a number of drafts that came out, I think there were about three drafts, we worked and got it down to one draft in around late 1990, moving into 1991. What became apparent then, to me, of being involved directly in this, was the idea that any regulation that we developed would have to work through the department and the department would have to approve that and then OMB would have to approve that before we would actually even get it out into publication. So, seriously, we had to ask how we would develop a Federal position on this, because at this point in time there was no Federal position within the department saying they condoned the regulations or they did not condone the regulations. They were being put together, getting input, and what you had was a draft of the regulations from the inputs of tribes. It was clear that in order for us to move this further through the process, we had to have a Federal position—

The CHAIRMAN. So, this set of regulations we have before us today represents the Federal position?

Mr. BROWN. Yes.

The CHAIRMAN. Not the Indian position?

Mr. BROWN. No; you're right, but we used the document that was provided. Our attempt as we moved that document through the discussion within the department was to try to stay as closely to that document and the intent with which it was produced.

Naturally, as I said, there were compromises through there as we began to work with the Bureau of Reclamation, Fish and Wildlife, Parks Service, et cetera, to ensure that we could get something that everyone could live with. The intent was, once those were derived, that a national tribal leaders meeting would be held to review those.

The direction that we received then from the tribal groups that met with IHS in Spokane was, "No, go ahead and put those regulations out and we will then have a national review team after the proposed regulations, to review those." So, it was based on that that we then moved those regulations to OMB to be published in proposed form.

The CHAIRMAN. So, we have a document as a result of discussions and negotiations and then you looked at that and felt that it did not reflect the Federal position, so you set up a set of regulations representing the Federal position, is that correct, to submit to OMB?

Mr. BROWN. The question was whether the regulations represented a Federal position. What we did then was to review those and identify what issues the Federal people had and then move forward to try to remedy those concerns, so that we had a document that we could place out to Indian country and say that based on their document, based on the Federal review of it, here was our position as stated.

The CHAIRMAN. That was part of the negotiation, or was that the final document?

Mr. BROWN. That is the document that we had intended to move forward to a national Indian meeting, but were directed that it would be best to move forward and publish as proposed regulation.

The CHAIRMAN. You were going to have the Indians discuss this, but it is going to be published as a final document?

Mr. BROWN. No; in proposed regulation.

The CHAIRMAN. Proposed, but it is going to be published in the Register?

Mr. BROWN. As proposed, yes. Yes, sir.

The CHAIRMAN. For comment?

Mr. BROWN. For comment. Yes, sir.

During that time, however, I must say that even when we were negotiating with the Federal individuals to develop our position, we did meet, I think on two or three occasions, with tribal representatives to bring them up to date on where we were in the internal negotiations.

The CHAIRMAN. Why are the Indians telling me now that it was easier before 1988 than it is now to do business with you?

Mr. BROWN. I don't know, sir. I'm not sure that the tribes are saying that. If they are, then I have—

The CHAIRMAN. It was testified here.

Mr. BROWN. I heard the attorney say it, I did not hear the tribes say it.

The CHAIRMAN. Well, I suppose he represents the Indians.

You heard the first panel. Did they sound pleased?

Mr. BROWN. No, sir; they did not.

The CHAIRMAN. Dr. Brown, in 1988, what was the level of personnel in BIA?

Mr. BROWN. You mean total number figures? I don't have those with me.

The CHAIRMAN. Is there anyone here who has that?

Mr. BROWN. No; we can provide those for the record.

The CHAIRMAN. Then give me a ballpark figure—in 1993, did that number come down or go up?

Mr. BROWN. I think the number, over the last few years, has definitely gone down in numbers of FTEs within the department. I cannot give you a definite figure on that, but our numbers have decreased, not increased.

The CHAIRMAN. According to our record it has increased, your BIA numbers, as far as FTEs.

Mr. BROWN. I can certainly check the record on that. That is not my understanding. My understanding is that—

The CHAIRMAN. Could they have gone down in education because the funding level was not high enough? Is the reluctance on the part of the bureaucracy based upon a fear that if you succeed in carrying out the intent of the Congress of the United States, the bureaucracy would have to diminished a little?

Mr. BROWN. I cannot say a definite "no" to that. There is always concern, when you begin to transfer programs, concerns of individuals concerning their jobs. Overall, though, I do not see that as the ultimate concern or the ultimate barrier.

The CHAIRMAN. Before 1988, how many pages of regulations did we have in contracting under 638? Mr. Miller said 12 pages. Is that correct?

Mr. THOMAS. As far as the Bureau is concerned, Mr. Chairman, we have in our Code of Federal Regulations, maybe 15 to 20 pages of administrative requirements.

The CHAIRMAN. And do you think it would simplify the 15 pages with a 400-page set of regulations?

Mr. THOMAS. When Congress passed the amendments in 1988, they directed us, and this is based on testimony from many tribal witnesses that I'm sure you remember, they advised that they wanted to have one document, one regulation, to go to, to determine all of the requirements that they'd have to live by in contracting. So, the law itself indicates and requires that the regulations include all Federal requirements in one regulation. I think it's important, too, to note that the initial drafts that were developed by the tribes themselves were around the same length. I'd say they were 400 pages or around that and we can submit that for the record.

The CHAIRMAN. Dr. Brown, having heard the three lawyers and the tribal leaders before them, do you believe that the Government of the United States, in implementing the 1988 amendments, carried out the intent of the Congress?

Mr. BROWN. In answering that, Mr. Chairman, I believe that there has been a sincere effort to.

The CHAIRMAN. It is one thing to say that there has been an effort, but do you believe the 428-page document supports and follows the intent of the Congress of the United States?

Mr. BROWN. As closely as possible, sir, given the amount of bureaus that are involved and the attempt that has been done, I think that reflects the best effort, yes, at this point in time.

The CHAIRMAN. Where did you not follow the intent of Congress?

Mr. BROWN. Well, ideally, with anything it would be nice to have one or two pages. The reality, as we've gone into this and begun to sit down with the Bureau of Reclamation, the Parks Service, DOI, and as we begin to see the enormity of the types and variety of services and programs that are administered, as well as the concern to assure the accountability of those programs, we brought people together to the table in a variety of positions. Based on that, and after long hours of discussion and debate, compromises were reached that tried to hit as closely to that original document or draft as possible. That was the attempt.

As I indicated however, earlier, there were compromises. There were things, based on a lot of discussion, which we would be prepared, Mr. Chairman, to prepare for the record as to how those positions were reached and why, that really reflected the feeling of the department that it could not go beyond where the decision was.

The CHAIRMAN. Like all of my colleagues, I serve on several committees. Besides this committee, I chair the Defense Appropriations Committee, and the Communications Committee and the Steering Committee, and I can assure you that whenever we enact legislation setting forth the intent of the Congress, agency heads have never come before us and said, "We made the best effort." They would either say that it was impossible to carry out the intent or that they had carried it out, even if it was painful.

When we tell them to fire 1,400 people, they fire 1,400 people. When we tell them, against their wishes, to purchase a certain type of aircraft, even if all of them disagree with the Congress, they purchase that aircraft.

That is the intent of Congress. If it is signed by the President of the United States, it is approved. This is the only place where I have heard agencies come forth and say, "We have made our best effort."

Mr. BROWN. Mr. Chairman, based on that definition, then let me say that, as defined, of getting that down to 2 or 3 pages, I would say that it is impossible for us to do such.

The CHAIRMAN. Assuming that the Congress does not follow the advice of the lawyers and adopt amendments, and leaves the 1988 amendments in place, and you have your 400-plus-page regulations, when can we expect these regulations to be published?

Mr. BROWN. Earlier, you outlined a schedule, I think, where—

The CHAIRMAN. That was a schedule that was suggested to us by your office.

Mr. BROWN. Okay. I am not aware of that schedule being proposed by our office, but it is fairly accurate.

What is currently happening within the department is that at the highest level within the department those regulations are being reviewed. Based on the initial review, the extent of further review will be determined and it will be decided upon at that time. The input from this hearing will certainly, I believe, assist the Secretary and the department in regard to review.

There is a real concern that the new Administration be clear on what the policy cuts are, our decisions, and that they are the ones that they could fully support before they would be prepared to publish proposed regulations.

The CHAIRMAN. I have been advised by staff that in fiscal year 1988 BIA staffing numbered approximately 12,400. At this present time it is 13,800. The only reduction is the proposed reduction in fiscal year 1994 resulting from the defeat of the economic stimulus bill.

Is that correct?

Mr. BROWN. I would have to go back and check my records. Since I do not have those numbers, I would have to go with the numbers that you're reading at this point in time.

The CHAIRMAN. Coming back to the time table, it is now May. Will the regulations be published in December? In January?

Mr. BROWN. I cannot, at this point in time, give a specific date on that.

The CHAIRMAN. Will it be published before May 1994?

Mr. BROWN. What I am prepared to state here, Mr. Chairman, is that we will give it high level, and as I indicated in my testimony, that we will do all that we can to expedite that effort.

The CHAIRMAN. Well, we have given high priority since 1990. So, I am asking you, with your high priority, when can we expect it? March 1994? April 1994? May 1994?

Mr. BROWN. It would be my hope and based on—

The CHAIRMAN. Because I do not want to tell Indian country we are doing our level best—you see, I am part of your team, I am one of the trustees in this trust relationship. When we speak of government-to-government relationship, I am part of the Government. When I speak to the other sovereign, I do not think they will accept my word if I tell them, "Well, we are trying our best—it may take 9 months, it may take 9 years."

What is the number that I can tell Indian country? And you cannot tell me that you cannot do it because we do it all the time. We went to Somalia and we contracted with the Somali Government to help them set up the school system and they did it in 2 months. Regulations. I would think that our Indian country people are much better prepared, physically, academically, mentally, in every category, and you are telling me that it is still going to take more than 1 year.

Mr. BROWN. No, sir; I did not.

The CHAIRMAN. Then how long will it take?

Mr. BROWN. Sir, I wish I could commit that at this time. I cannot commit it other than that it is being currently reviewed, as I indicated, at the high levels of the department. They will expedite it.

The CHAIRMAN. Then I will tell Indian country that we may have to consider amendments, because that means 3 or 4 years again.

Mr. BROWN. I do not necessarily agree with that, but I understand the comment.

The CHAIRMAN. Well, you can understand my frustration.

Mr. BROWN. Yes, sir.

The CHAIRMAN. Because I get more letters, I believe, and more calls from Indian country than your office does and I hate to tell them that we are just trying out best. I am just surprised that the Indians are so gentle and patient. Too bad I am not one of them—we would be on a "war path".

Well, Dr. Lincoln, what do you have to offer here.

STATEMENT OF MIKE LINCOLN, ACTING DIRECTOR, INDIAN HEALTH SERVICE, ROCKVILLE, MD, ACCOMPANIED BY ATHENA SCHOENING, OFFICE OF TRIBAL ACTIVITIES; GARY HARTZ, DIVISION OF ENVIRONMENTAL HEALTH; DWAYNE JEANOTTE, INDIAN HEALTH SERVICE; AND DR. CRAIG VANDER WAGON, OFFICE OF HEALTH PROGRAM

Mr. LINCOLN. Mr. Chairman, it's a pleasure to be here.

I'm not a physician or a Ph.D. I'm the acting director, at this moment, of the Indian Health Service.

I'm joined by Athena Schoening, to my left, who is the deputy associate director for the Office of Tribal Activities, and Gary Hartz, who is the director of the Division of Environmental Health. In addition, there is Dwayne Jeanotte who is the acting deputy director of the Indian Health Service and the Billings area director, and Dr. Craig Vander Wagon, who is from our Office of Health Programs.

Mr. Chairman, Dr. Brown went over very specifically the activities that occurred in 1989, 1990, 1991, and 1992, and brought us up to date to this point in time. I will not repeat that information. I have submitted testimony for the record.

I would like to place this regulation in context, from an Indian Health Service perspective, and I'll do that very briefly.

Currently, the IHS has contractual agreements with tribal organizations in an amount of approximately $470 million. That constitutes about 35 percent of our clinical services program, so those contracts that we speak of and the impact of these regulations are

significant in Indian country and they have significant impact on the Indian Health Service.

These contracts include eight hospitals, 331 health centers operated throughout the country, and I might say that all of those hospitals are accredited by the Joint Commission on Accreditation of Health Care Organizations. It includes, also, programs like the community health representative program, and alcoholism programs. Through these contracts, approximately 7,000 hospital admissions were provided in fiscal year 1992. There was approximately 1.2 million outpatient visits provided through these tribal contracts, 3.8 million community health representative visits, and 600,000 outpatient visits associated with alcoholism.

Mr. Chairman, the Indian Health Service, as it has worked with the Department of the Interior and within its own Department of Health and Human Services, certainly understands and, perhaps, is the cause of some of the delay in implementing these regulations. We have worked diligently in negotiations within our department and in negotiations within the Department of the Interior.

The Secretary of Health and Human Services, Secretary Shalala, has been provided briefings regarding the draft regulations that you have in front of you and that we're discussing today. And, we have provided briefings to the new leadership within the office of the Assistant Secretary for Health, including Dr. Philip Lee, who is the Assistant Secretary for Health designate.

Secretary Shalala has been advised by the Indian Health Service and by the office of the Assistant Secretary for Health that what needs to occur now is that the regulation needs to be signed off on, on behalf of the Secretary and the department, and that we need to proceed into the formal comment period and in that formal comment period. The issues that are raised today in front of this Committee and the issues that will be raised by tribal governments and Indian individuals and other interested individuals could be factored in. The regulation that is in draft now could be modified based upon those comments.

Secretary Shalala has made a decision to go forward and sign this current draft regulation and to provide that regulation to the Congress and to the OMB concurrently.

Mr. Chairman, we are certainly available to answer any questions that you may have regarding the Indian Health Service's involvement in this regulation. Thank you.

[Prepared statement of Mr. Lincoln appears in appendix.]

The CHAIRMAN. Thank you very much, Dr. Lincoln. Dr. Brown and Dr. Lincoln, we will be submitting to both of you an array of questions.

I would like to ask two questions, at this time, for both of you. These are very important, so I will read them. I do not want any misunderstanding.

In enacting the 1988 amendments, the Congress clearly stated its intent that all organizational levels of operations within each department could be contracted by tribal governments. In contrast, the draft regulations, as we have read them, appear to limit the contracting of organizational functions to the field level, "operation of services". In fact, it seems that the draft regulations would prohibit the contracting of any functions that involved the exercise of

any discretion, judgment, and oversight responsibilities that are vested in the Secretary by law, or by virtue of the trust responsibilities.

First question, for both of you. Where do you find the statutory authority in the Act for limiting tribal contracting to the field level "operation of services"?

Mr. BROWN. Let me respond first, Mr. Chairman.

The CHAIRMAN. Please do.

Mr. BROWN. First of all, we do not limit. I think that statement is not correct, as we interpret it—we do not limit that.

Mr. Thomas, if you would want to provide any more information on that, I think that's important to make that statement.

Mr. THOMAS. Thank you, Mr. Chairman.

We do not believe that our regulations limit contracting. In the bureau's structure, we have the intermediate offices which are area offices which we fully believe and understand that they provide programs and services to Indian tribes.

The difference between local reservation agency offices and the area offices is that the area offices service more tribes. So, we understand that when tribes wish to contract services and programs from our intermediate or area offices that they are certainly able to do that under these regulations. The only difference would be that, in most cases, in our area offices these programs service multiple tribes. Therefore, a requirement for contracting these programs or services at these intermediate offices would be that all tribes agree through resolution that they wish to contract those programs.

The CHAIRMAN. You are saying you will not frustrate the Indian tribes?

Mr. BROWN. That's what we're saying, sir.

The CHAIRMAN. How is it that all of the tribes feel that this statement is correct? And all of their lawyers believe that your regulations prohibit contracting of any functions that involve the exercise of any discretion, judgment, and oversight responsibilities vested in the Secretary? Are all of these lawyers and tribal leaders wrong?

Mr. SKIBINE. Hopefully not. What we have in the regulation is a provision that requires that certain administrative actions that are inherent Federal functions are not contractible.

The CHAIRMAN. What are the "inherent Federal functions"?

Mr. SKIBINE. Those would be decisions involving the setting of Federal policy for the Government, involving these types of discretion, in that sense.

The CHAIRMAN. That would mean area offices.

Mr. SKIBINE. No, absolutely not. We have a list in here of eleven such functions which we think are not contractible.

Let me just pick one of these out. "Formulation of policies expressing budgetary and legislative recommendations and views and the publication of regulations, policies, and notice in the Federal Register."

For instance, submitting legislation to Congress. These are the kinds of inherently Federal functions that we feel cannot be contracted to tribes. Or, for instance, nondelegatable trust duties of the Secretary.

Let me give you an example. For instance, if a tribe wished to contract for the real estate services that the bureau operates, as many tribes have done, the contracts currently entered by the bureau that that does not include the nondelegatable trust duties of the Secretary. For instance, the ultimate decision to approve an appraisal of land would be retained by the Bureau of Indian Affairs because that is a nondelegatable trust duty.

We don't feel, incidently, that there is much disagreement with tribal limits on some of these functions, there are some disagreements, but certainly, I think that everyone recognizes that some of these core discretionary Federal functions cannot be contracted.

The CHAIRMAN. Do you believe that your definition carries out the intent of the Congress?

Mr. SKIBINE. Which definition is that, Mr. Chairman?

The CHAIRMAN. Because I have always felt that the contracting was going to be done without regard to organizational levels.

Mr. SKIBINE. That's another issue. That's the definition of program, which is a delivery of services and as you have heard Dr. Brown and Mr. Thomas state, it is certainly not the intent of the Department of the Interior to limit contracting of these sorts of programs.

The other part of the question related to specific discreet functions that must be made by a Federal official.

The CHAIRMAN. In other words, what you are telling me is that you will be the one to finally decide what is contractible and what is not.

Mr. SKIBINE. That's right, as far as these inherently Federal functions.

The CHAIRMAN. Oh. Who will decide what is inherently a Federal function?

Mr. SKIBINE. The Government does, under the regulation, yes.

The CHAIRMAN. This is the Federal position?

Mr. SKIBINE. It is the Federal position embodied in the regulations.

The CHAIRMAN. Do you believe that this is the congressional position?

Mr. SKIBINE. I don't what the congressional position on that issue is.

The CHAIRMAN. Or you do not care what it is?

Mr. SKIBINE. No; we certainly do care. We do not think that our regulations, that 35 weeks of these Federal administrative inherent functions listed in here, we certainly do not think that the 638 law or the legislative history indicates that those would be contractible.

The CHAIRMAN. I hope that all of you are convinced that Indians are capable of governing themselves. No one disputes that?

Tribes have commented that restricting contracting to only those functions that do not require the Secretary's discretion, judgment, or oversight responsibilities may be used as a shield to prevent tribal contracting in a vast array of situations involving any Federal executive discretion.

How do you resound to that?

Mr. LINCOLN. Mr. Chairman, if I could, on behalf of Indian Health Service and the Department of Health and Human Services, clarify a little bit on the previous question.

In a specific section of the regulation, the regulation defines what is meant by "program", and it's defined as "the operation of services for tribal members and other eligible beneficiaries". The following sentence, I think, deals with one of the aspects of your first question.

Service delivery programs subject to contracting under these regulations are generally performed at the reservation level, but may be performed at higher organizational level within the Department of Health and Human Services, and in the Department of the Interior.

It is clearly our understanding that, where those program services are provided, that they are contractible regardless of where they appear in the organization.

The second point that I would like to make and followup on Dr. Brown's comments and Mr. Skibine's comments is that the regulation also provides an appeals process regarding these kinds of contractibility issues. That appeal process, I believe, is subject to an administrative law judge, so that it will be on the record.

The CHAIRMAN. My final question. The Department of the Interior takes the view that a 638 contract, like a self-governance compact, cannot be refused because of the impact that awarding the contract would have on the Bureau's services to other tribes. The department also takes the view that the BIA is responsible, whether through internal restructuring, increased appropriations, or both, to ameliorate any adverse affects on other tribes.

Yet, the Indian Health Service takes precisely the opposite view of the very same law.

Is it the view that the Congress should further clarify the act on this matter so that the IHS and the BIA do not take conflicting positions on what the law means and how it should be applied?

Mr. LINCOLN. Mr. Chairman, if I might be the first to answer that question.

It is clear that the Indian Health Service and the Department of Health and Human Services has advocated the position that it has a responsibility not only to ensure that there are satisfactory services for those tribes who depend on contracting the program from the Indian Health Service, but it also has a responsibility to ensure satisfactory services for those tribes who are not contracting under Public Law 93-638. So, this provision and the way that it's constructed allows the Federal Government, through this regulation, to take into account those tribes who have decided not to contract but might be impacted by contracting activities.

The CHAIRMAN. Then the contract is a sham is it not, because you can always argue that there is inadequate funding, that if you give the contractee whatever is required under the contract, it will have to be taken away from other tribes, and therefore it is not going to be done that way.

Mr. LINCOLN. Mr. Chairman, I firmly believe that this provision deals more with satisfactory services. I do realize that that is impacted by the amount of funding that is generally available in a local setting. We have many health service programs and clinics that provide services to multiple tribes in a given setting and we clearly understand that there are limited resources. We ration care—it doesn't bring me any pride to say that—but it is the reali-

ty that we live with in the Indian Health Service and within Indian communities.

We do believe there is, if not a duty, a responsibility to take into account satisfactory services for all Indian beneficiaries. It is not our intent to use this in manner that would further inhibit contracting by those tribes who choose to exercise their rights under the Indian Self-Determination and Education Assistance Act.

The CHAIRMAN. I want to thank all of you. I will be submitting questions, and incidentally, we would like to have your responses within 2 weeks because we want to act upon it expeditiously. Not just your best effort—2 weeks.

I just want to make an observation. I was happy that the Alaskan representative was here, Mr. Peltola, because his descriptions were very gentle. He said that very likely that the health conditions there may be about as bad as you can find in Native America. It is the worst in the Western Hemisphere. The incidence of Hepatitis A and B cannot be compared to any other area. I am certain that you know that of the 200 tribes up north, or villages, about 180 of them have to depend on "honey buckets"—something that most Americans are not aware of. And, that we have washeterias where you pay anywhere from $4.00 to $6.00 to wash a load and anywhere from $1.75 to $3.00 to dry that load and anywhere from 75 cents to $2.00 to take a shower. Is that correct, Doctor?

Mr. LINCOLN. That's correct.

The CHAIRMAN. How can we use rhetoric in regulations and close our eyes to all of that? I mean, this is a disgrace. People are dying. Communicable Disease Center in Atlanta is now using these villages as laboratories because hepatitis is so common, it is the norm there. They have got all these "guinea pigs" there, and these are American citizens.

[Whereupon, at 12:07 p.m., the Committee adjourned, to reconvene at the call of the Chair.]

APPENDIX

Additional Material Submitted for the Record

Prepared Statement of Hon. Nancy Landon Kassebaum, U.S. Senator from Kansas

Mr. Chairman, as we receive testimony from tribal representatives and from the two departments which have been charged with implementing P.L. 100-472, it is difficult to believe that nearly five years have passed and we still do not have regulations to the Indian Self-Determination Act, a law which was intended to assure maximum participation by Indian Tribes in the planning and administration of federal services.

Simplifying the process and removing existing regulatory and statutory barriers to effective and efficient tribal contracting seems an eminently worthwhile purpose and, had the regulations been in place as enacted, I am confident that much confusion and concern could have been avoided.

The divisibility issue has caused concern in Kansas. The four resident tribes have been sharing services at the Holton Clinic since 1974. As is their right, one tribe requested to take over their portion of services. IHS determined the size of the service population and approved a transfer of more than 30% of the total budget allocation of $1.8 million. In such a small facility, the impact was almost immediate. Although the Indian Health Service maintains that they wish to deliver the highest possible level of health care to tribes who choose not to contract as well as to those who do, the reality appears to be otherwise.

While I do not believe that program division should be an excuse for the IHS to decline a contract, clearly, the non-contracting tribes sharing services should not be adversely affected. Under IHS regulations, the contracting tribe continues to receive the same percentage of the total budget for as long as their contract is in force. There is no question that the present policy is inadequate. Further, without a commitment to ameliorate any adverse affects on these tribes, this policy seems to pit tribe against tribe.

It is estimated that by the year 2,000, 75% of IHS services will be contracted under the self-determination act. Therefore, I hope that the Bureau of Indian Affairs and the Indian Health Service can make significant progress in addressing the pressing needs in Indian country for clear direction and a simplified and improved process.

Prepared Statement of W. Ron Allen, Chairman and Executive Director of the Jamestown S'Klallam Tribe

Mr. Chairman and members of the Committee, I thank you for inviting me to testify before you on the status and implementation of P.L. 100-472 amendments to the Self-Determination and Education Assistance Act of 1975 (P.L. 93-638). In behalf of my Tribe, I have been attending most of the meetings and workgroup meetings over the last four and one-half years.

There has been a long and rough relationship between the American Indian and Alaska Native Tribes and the U.S. Government. For centuries the Tribal governments and our communities have been dealt with in a demeaning manner that has never allowed the Tribes to be provided the same opportunity to live and grow in health and prosperity. Every time the American society has discovered that the tribes preserved something of value, whether it is gold, oil, a tax-exempt advantage, or an opportunity to conduct an activity such as gaming, it has moved quickly to take it away. We are here to share with the leaders of this Congress our frustration with the Administration's inability or unwillingness to carryout the instructions of Congress to restore to the Tribes their sovereign authority to conduct their affairs according to their governmental system.

It saddens us, as Tribal leadership, to have to be patient with a system that insists on being paternalistic and unwilling to accept the unique stature of the Tribes as independent sovereign governments acknowledged by the American political system in the Constitution and through treaties and other legal instruments. Fifty years ago, it is understandable that the bureaucracy would be so unwilling to accept laws and regulations that provide Tribal control and liberty due to the Tribes' limited administrative capacity to manage the programs and resources. Yet, today these conditions and capabilities have changed dramaticly. The political and administrative capacity and competence has risen to a level that we absolutely confident that we can utilize and manage the limited resources provided by the Congress better and more efficiently than the federal bureaucracy.

We know that we don't have to remind this Committee of its intent with the P.L. 100-472 and P.L. 101-??? amendments and how these amendments were targeted at providing the Tribal governments the greatest amount of liberty and control over the affairs of the Tribal communities. In our judgment, the Congress intended to provide the greatest amount of flexibility to allow the Tribal governments to administer these Federal programs, activities, functions, and services under the authority of the Tribal laws for many reasons including: (a) to allow these programs to be administered under tribal control; (b) to provide the Tribes with greater control over the programs and services intended for the Tribal communities to enhance the efficiency and effectiveness of these resources.

Unfortunately, the length of time that it has taken us to establish regulations that reflect these principles is a clear commentary that the bureaucracy does not want to let go of control over the Tribes' affairs. They consistently hide behind notions that the need to maintain certain regulations such as the Federal Regulations Acquisitions (FARS) is necessary to assure that construction projects will be carried out responsibly. Another example is the unwillingness of the BIA/IHS officials to recognize that all contract and grants should be treated the same. They have many excuses why they do not want to treat these funding instruments the same, but they are always to the detriment of the Tribes.

We are particularly frustrated over the Departments of the Interior and Health and Human Services unwillingness to meaningfully involve the Tribal leadership in the development of the regulation over the last two years of review. In the first two years, the Tribal leadership was somewhat patient to accept the delay in publishing the regulations because we were involved and this condition reflected the new attitude and principles directed by Congress to implement the "government-to-government" relationship. We have consistently heard the rhetoric of acceptance of this principle, but we have not witnessed the actions that reflect the words. The first few meetings characterized how important these regulations were to the Tribes because there were over 400 of the 510 Tribal governments represented. As followup meetings were coordinated less participated, but not because of lack of prioritization. There were other pressing issues that had to be addressed and the Tribal leadership had confidence in the active participants who continued to stay involved in participating or attempting to monitor the status of the regulations.

The long overdue publication of the regulations exhibit the bureaucracies poor attitude regarding the policy of Congress and tile urgent need of the Tribes, who should have been enjoying the flexibility and liberty provided in the amendment legislation (P.L. 100-472 and P.L. 101-??). Unfortunately, because of the Administration's reluctance to interpret the amending legislation liberally in the interest of the Tribes, we have needed to request the Congress to consider additional amending legislation to clearly interpret the original, language. It has been very frustrating to witness their consistent attitude and propensity interpret the law in a very restrictive manner and contrary to the expectations of the Tribal leadership even though many of the active Tribal leaders involved in the original language was present to communicate the intent.

Subsequently, we are in need to additional amendment legislation that reflect additional problems that the bureaucracy is not willing to interpret the law in a manner that reflects confidence the Tribes administrative capacity and competence, but their views also do not advance the Administration's commitment to the "government-to-government" relationship and principles. We are consistently asking the question: "Why?" In our judgment, if they truly believed in the "government-to-government" principle, they would not continue to impose conditions such as program standards or quality assurance criteria. If they believed in the right of Tribes to recover all costs in carrying out Federal programs, functions, activities, and/or services, they would not try to re-categorize some activities as contracting as opposed to contracting activities to avoid providing Tribes from recovering "contract support and indirect costs" in administering these activities. It is really irritating that the Departments refer to the Tribes as "vendors" or that we are over-recovering funds from the Federal government even though we have justified these cost recoveries many times over through studies, audits, and negotiations with the DOI Inspector General's Office.

Our request for additional legislative amendments have been characterized as "micro-managing" by Congress. We would like to point out that if the Administration continues to ignore the intent of Congress and redefine the purpose of the legislation then it will always require "micro-managing" legislation to break the administrative control over the Tribes' affairs by a bureaucracy that cannot let go itself. The battle to remove the bureaucratic harness from Indian affairs will require strong, clear, enforcing measures that cannot be misinterpreted.

We ask the question: "How can we truly build a partnership relationship and a foundation of trust, if the people carrying out the mandates from Congress continue to act contrary to the wishes of the legislative body of the Federal government?" Another question we pose is: "Are we going to enter into a new more progressive era of Indian relations or are we going to preserve the old 'paternalistic' attitude that we have experience over the last 200 years?"

The last Administration could not or would not make the bold and confident move to make a meaningful change in the implementation of the "government-to-government" relationship between the U.S. and Tribal governments. Our plea today to two-fold: (1) asking Congress to urge the Administration to publish the regulations quickly and we mean quickly not four or five years later; (2) to seek additional Congressional legislation to avoid additional negative interpretation by the Department personnel and to provide additional instruction to the Administration on how to provide administrative authority and liberty to Tribes to manage their affairs according to their priorities; and (3) to urge the Administration to accept the new approach of implementing the "government-to-government" relationship through participation.

It is important to cause the Congress and the Administration to remember that sometimes it takes time to right wrongs of the past. Old ways will not change quickly. I certainly have appreciated Dr. Eddie F. Brown's attempt to cause change in a system, unfortunately it was not the time for this progressive and mature attitude to become a reality. This experience reminds me of a Christian witnessing to an unconverted person. The Christian is told to continue to witness even though they do not see change in the person. Eventually, the Holly Spirit will plant the seed of enlightenment. The unconverted will see the light and understand the belief and hope of the Christian views of life and begin to change his ways. This analogy is one that I hope will provide continued patience and strength to preserve for ours goals. Indian Country will not give up. We will continue to "chip away" at making our relationship better and more consistent with the integrity of this Country's commitment to the American Indians and Alaska Natives through treaties, statutes, Executive Orders and other legal agreements throughout our history.

Our hopes are that this administration will provide clear instructions to the "old guard" bureaucracy to provide the Tribes with regulations and programmatic conditions that allow the Tribes to conduct their affairs as governments not contractors. We are appreciative of the support and graciousness of this Congress to correct the errors of the past Administrations and injustices committed to Indian Country. The Tribal leadership will continue to work with you and have faith that the Federal government will begin to administer its relations with Indian governments in a manner that will provide us with the tools to address the problems and needs of our communities.

PREPARED STATEMENT OF GENE PELTOLA, PRESIDENT, YUKON-KUSKOKWIM HEALTH CORPORATION, BETHEL, AK

Good morning Mr. Chairman and members of the Committee. My name is Gene Peltola and I appear today as President of the Yukon-Kuskokwim Health Corporation of Bethel, Alaska, as Chairman of the Alaska Association of Regional Health Directors (ARHD), and as a member organization in the Alaska Native Health Board. We join in the call of my tribal colleagues today for further congressional reform of the "638" contracting process, given our 5-year experience with successive IHS draft regulations.

Before focusing on one or two issues, let me introduce you to our organization. The Yukon-Kuskokwim Health Corporation (YKHC) is a non-profit inter-tribal organization that delivers primary and secondary health care, educational, preventive, and health planning services to the Alaska Native people of the Yukon-Kuskokwim Delta Region of Alaska. Operating through an in-patient and out-patient hospital and 48 remote village clinics, the Corporation receives funding for its operations primarily through the Alaska Area Office of the Indian Health Service, as supplemented with community service grants from the State of Alaska and third party billing revenues.

Organized in 1969 as part of the Office of Economic Opportunity's effort to develop consumer controlled health organizations, YKHC started with four programs. Today it operates over one hundred programs and is the largest federally designated Indian Health Service tribal contractor in the United States operating under the Indian Self-Determination Act. For the record, the Association of Regional Health Directors is a technical advocacy group composed of the Presidents or health directors of all tribal contractors in Alaska. Similarly, the Alaska Native Health Board is a research and statewide advocacy group representative of the consumer needs of our people.

YKHC serves a region of about 76,000 square miles, approximately the size of the State of Kansas or the State of Oregon, with a 1990 census population of 19,863. The region's Alaska Native Tribes (both Yup'ik and Athabascan) make up over 86% of the population, the highest concentration of Native people in any region of Alaska. The people served by YKHC reside in 50 tribal villages located throughout the Delta region, none of which are connected by any road system. All travel must be via air (and in some cases, by snowmachine or boat depending on the season, weather, and location).

On October 1, 1991, YKHC added to its Indian Health Service (IHS) contract the management and operation of the in-patient facilities of the Yukon-Kuskokwim Delta Regional Hospital (YKDRH) situated in Bethel. This hospital is a 50 bed general acute care medical facility also housing laboratory services, a comprehensive dental clinic, an eye clinic and maternal-child health promotion programs. The single story steel frame structure encompasses 100,000 square feet and enjoys full accreditation by the Joint Commission on Accreditation of Healthcare Organizations. Overall YKHC employs some 600 individuals. As part of its operation YKHC has the largest field health care program in Alaska. Presently, the 176 Community Health Aides (CHA) who work in 48 village-built clinics make up the heart of the YKHC health care delivery system. Our CHAs are virtually all Alaska Native and work in unique situations. Living in their home communities, they provide basic health care services to the villages in our region. Much of this is accomplished through consultation with the hospital physician staff via telephone or radio.

The CHAs workload is intense and ever-expanding. During fiscal year 1992, 93,797 village patient encounters were made, a 14.7% increase over the prior year and more than twice as many as any other region in the State. One reason for the large number of encounters is that the overall health status of the people within the region is among the lowest in the Nation. Sadly, in major part this is attributable to the lack of adequate water and sewer systems in most of the villages, conditions comparable to many Third-World countries. Only one-fifth of our communities have piped water and sewage systems, and only 22 of the 50 communities receive technical and training assistance from YKHC for their alternative systems (which generally consist of sewage pits or bunkers where sewage is carried by hand, and a central village well and storage tank where water is chemically treated and manually carried to the homes).

Although the needs and challenges are great, we are excited about our work and equally encouraged with the prospects for improvement. It was, in part, for these reasons—and the expectations for increased efficiencies, reductions in red tape and the hope of stopping inequitable IHS budget cuts to our Service Unit—that YKHC's

member tribal governments chose to move forward and contract for the management of the hospital.

YKHC has met substantial challenges since taking over management of the hospital a year and a half ago. The contracted operations are very significant and the total amount of money involved, over $35,750,000 last year (including non-recurring and carryover funds), is indeed large. But with a recurring base of approximately 26,300,000, the needs are great so great that they literally dwarf the current budget. In the spirit of self-determination and responsibility, YKHC has added to its recurring contract dollars as fast and as much as possible. Last year approximately $4.5 million was added to our contract from Medicare and Medicaid collections, and another $600,000 was collected from individuals and insurance companies. These sums have tripled collections over what they were prior to YKHC's takeover of the hospital. In addition, litigation was initiated against insurance companies that historically have failed to pay their bills in violation of Congressional mandate, already yielding several hundred thousand dollars. Finally, education and registration programs, together with new hardware and software, have been put in place to maximize future billing opportunities.

Underlining this hard work is a severe and growing problem: Dealing with Prevention. The cost of curing is so great that little, if any, is left for prevention; rising costs are making things worse, not better. Even so, during fiscal year 1992 YKHC did take important steps toward increasing preventative care and reducing costs. Two examples are the purchase of mammography equipment—never available under prior Federal management—and an oxygen generator. These, and other actions, while beneficial and cost effective, fall far short of the full need and came at substantial cost. YKHC used all $2.8 million of carryover moneys it had available last year and the over $5 million collected from billings, and still spent $500,000 more from prior year's savings. Even after all these actions, health care in the Delta Region remains primarily crisis-oriented and not preventative.

Our experience in delivering health care in Alaska within the framework of the Indian Self-Determination is not altogether unique. Indeed, except for the central IHS Area Offices and the Alaska Native Medical Center (ANMC) in Anchorage, virtually the entire IHS system is presently under contract to tribal organizations. This year our Native organizations are putting into place plans to take over the operations of both ANMC and the Area Office. With more activity in our Area than anywhere else in the country, we in Alaska have a keen interest in the 1988 Amendments and in their failed implementation.

With respect to the 1988 Amendments, a major source of our severe funding problems in the Yukon-Kuskokwim Delta, as in other regions of Alaska, comes from indirect cost shortfalls, a problem which literally forces us to rob our programs in order to run our operations. Public Law 93-638 and its subsequent amendments clearly reflect the Congressional intent to fully fund indirect program costs to preserve direct health care funds for direct services. But sadly, this is not happening—and to a great extent because the shortfalls are not being properly recognized by IHS and reported to Congress.

Let me give you an example from YKHC. Earlier this year, the Alaska Area Director reported to the Indian Health Service Headquarters that the total indirect shortfall within the Alaska Area during fiscal 1992 was a mere $1,520,604. We subsequently learned that even this incomplete information was never forwarded to Congress as required by law. Moreover, the amount was woefully understated and inaccurate.

By definition, an "indirect cost shortfall" is the difference between the application of a federally approved indirect rate to a contractor's allowable and allocable program expenses, and the amount of indirect dollars actually received by a contractor. Practically speaking, indirect funds are used to manage and support YKHC's programs. The funds are necessary to operate payroll and personnel systems; operate procurement systems; house administrative offices; cover all facility costs (including lease costs, utility expenses, security and maintenance, and housekeeping); purchase accounting, auditing and program monitoring services; cover Board costs, and costs of executive management; purchase property insurance; purchase and maintain office equipment; and train employees.

YKHC's indirect rates are carefully and painstakingly negotiated every year with the Department of Health and Human Service's Region X Division of Cost Allocation. Then, the rate is further reviewed and approved by Region IX Division of Cost Allocation. In turn, IHS's Self-Determination Act contracts clearly distinguish indirect contract dollars from direct program dollars. Thus, identifying the funded side of the equation is simple. The same process applies to all other tribal contractors

whose "cognizant agency" is DHHS, and the process is similar to the one used by the DOI Office of Inspector General.

YKHC's IHS contract identified only $4,013,291 of available fiscal year 1992 indirect dollars. But for the same year indirect expenses allocable to the IHS (again, according to Region X's calculations) total led $7,000,000. Thus, in FY 1992 YKHC suffered over $3,000,000 shortfall in indirect cost payments. Last year the $3,000,000 shortfall was secured by robbing direct health care dollars and reducing services, thereby further impeding YKHC's ability to rise above crisis health care management.

When confronted with this problem, the Alaska Area Indian Health Service Office's solution was to attempt a unilateral paper reclassification of $3,054,471 of direct health care dollars to indirect dollars. A similar aborted attempt was made at the beginning of fiscal 1993. Aside from being illegal, such action defies commonsense. In the end, none of YKHC's indirect cost shortfall was ever reported to Headquarters. Later, we learned the same maneuver had been worked upon several other tribal contractors in Alaska, under directions from the IHS Office of Tribal Activities in Headquarters.

Today, YKHC is financially unable to maintain even last year's level of care. Services have suffered. Moreover, to remain within budget this year, management has been forced to reduce the hospital work force by 44 positions. Further cuts loom on the horizon, especially if third-party collections do not substantially increase. Our situation is critical. And again, other tribal contractors have experiencing the same problem.

Let me put into concrete terms what restoring a $3,000,000 shortfall in our region could mean. If appropriated on a recurring basis, six physicians needed to expand patient care could be hired. These positions could perform the following: (a) Internal medicine specialty units—2,500 annual outpatient visits; (b) Physician village 'visits—2,500 annual patient contacts; and (c) General family practice clinics—7,000 annual outpatient visits. Patient encounters are critical to the early identification and treatment of disease. For instance the rate of cervical cancer in Alaskan Native women is two times the national average for all races. It is the second leading cause of death for women. It is also one form of cancer which is both preventable and treatable. Treatability is enhanced by early detection, a product of frequent patient encounters.

The availability of additional physicians would also enable us to meet critical patient needs in screening children in school (the Early and Periodic Screening and Testing Program). The medical services which are identified and provided are reimbursable under Medicaid, but YKHC currently lacks the physician staff necessary to provide these services. In another area, YKHC has a grave need to upgrade its medical evacuation capability to comply with new FAA regulations. This significant risk management issue alone will cost hundreds of thousands to cure. Elsewhere, YKHC cannot appropriately upgrade its ancillary services given the current severe shortfall. It is in critical need of an ultrasound machine and certified mammography and sonography technicians.

Other benefits of full funding for indirect costs include the ability to purchase a CAT scan that would greatly enhance early detection of cancer [1] and to hold specialty clinics at least four times a year in the areas of ear, nose and throat (400 patient contacts), urology (200 patient contacts) and general surgery (800 patient contacts). In addition to adding to preventative care, these services would generate additional monies from billings, which would in turn add even greater benefits to our preventative care programs—but all this only if the burden of the indirect cost shortfall is lifted.

The sad reality is that in all these areas YKHC cannot take actions which would generate off-setting revenue reimbursements due to the burden of the indirect cost shortfall. For these departmental abuses to cease, Congress and this Committee must insist that IHS comply with all the funding and reporting requirements of the Indian Self-Determination Act, so that Congress is kept fully informed on the status of indirect funding.

I have limited my remarks today to this one issue of indirect costs, partly because of its vital importance and partly in deference to my fellow tribal leaders and the attorney witnesses who will be covering other issues. As you will hear, however, our concerns with the Departments' direction, as revealed in the January 1993 draft regulations, extends well beyond the indirect cost funding and reporting issues.

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[1] According to an April 1992 study by the Center for Disease Control cancer is now the leading cause of death among Alaska Native women, and the second leading cause of death among Alaska Native men.

Issues of contractibility, program standards, appeals, government sources of supply, redesign flexibility, contract funding suspension, property management and on and on cry out for further reform by Congress.

We have waited five years, only to be told we must wait another two years to see the 1988 Indian Self-Determination Act Amendments fully implemented—but implemented (according to the latest draft) on a selective, narrow and hostile basis. We deeply appreciate Congress convening this hearing and we look to your leadership for further action to make the 1988 Amendments a reality today

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PREPARED STATEMENT OF BRITT CLAPHAM, SENIOR ASSISTANT ATTORNEY GENERAL, NAVAJO NATION, DEPARTMENT OF JUSTICE

Mr. Chairman, my name is Britt E. Clapham, II. I am the Senior Assistant Attorney General in the Navajo Nation Department of Justice. On behalf of the Nation and myself I appreciate your invitation to testify on the proposed regulations to implement the 1988 Amendments to the Indian self-Determination and Education Assistance Act. Since passage of the amendments I have been involved in the development of these regulations first from 1988 through late 1990 on behalf of the Navajo Nation, then from late 1990 until January of 1993 for the Tohono O'odham Nation, and since January again with the Navajo Nation. Throughout that period I represented tribal divisions and department who contract pursuant to the Act.

I present this testimony on behalf of the Navajo Nation, having reported to and been authorized to testify by the Inter-governmental Relations Committee of the Navajo Nation council. My testimony will focus on three issues concerning these proposed regulations. Those issues are, Indian preference in employment and contracting; the Scope of the construction contracts and issues related to Trust Resource Program contracting and the Trust Responsibility.

As I have participated in the development of the regulations since 1988, on behalf of my clients, it is important to understand that when there have been three-way efforts involving tribal representatives, Department of the Interior (DOI) representatives and Department of Health and Human services (DHHS) representatives this process has moved expeditiously. By contrast when DOI and DHHS representatives have addressed these regulations in the absence of tribal participation the regulations have languished. From August 1990 until January 1993 no meaningful participation by tribal representatives was permitted. This fact alone demonstrates the need for further tribal participation in refinement of these regulations to ensure that the regulations follow the spirit and intent of the statute.

Indian Preference in Employment and Contracting

Throughout the regulation development process the issue of Indian preference as opposed to tribal preference has been discussed and debated between tribes, Department of Health and Human Services and Department of the Interior.

In the proposed regulations sections 900.115 and 900.605 address employment and contracting preferences respectively. In both instances these provisions preclude preferences based on tribal affiliation. The Navajo Nation has enacted statutory schemes affording tribal preference in both employment and contracting. (Navajo Preference in Employment Act, 15 N.T.C. section 601 et seq. and the Navajo Nation Business Preference Law 5 N.T.C., 201 et seq.). The tribal representatives have presented various arguments in favor of the tribally affiliated preference schemes. From the preamble of the regulations it appears that DHHS agrees with the tribal position while DOI does not. Creating an inter-departmental conflict which is settled at the expense of tribal economic policies and self-determination

The DOI position on tribal preference is, according to the preamble to these proposed regulations, based upon opinions of the Department's solicitor. There are two such opinions one in 1986 and another in 1992. Neither opinion analyzes the preference in light of the purposes of the Indian Self-Determination Act. Further both of these opinions appear based in some degree on departmental regulations not applicable to P.L. 93-638 contracts.

The Department of the Interior's position ignores that the Indian self-Determination Act has two purposes, the development and enhancement of Tribal self-government and the development of Tribal economies. The policy declarations contained in Section 3(b) of the Act make this clear.

No activity is more central to the development of true tribal self-government than the hiring and retention of tribal members. Further, it is a logical step to move from a "federal Indian preference" approach to a tribal preference when a tribe contracts a federal program or function. Specific tribal preference also furthers the underlying federal policies of the 1988 Amendments to the Act. In the legislative

history, this Committee noted the policy changes which were designed to accommodate the individual needs of tribes:

> This change in the statement of policy is intended to strengthen the government-to-government basis of Federal services to tribes, and *to emphasize the need for the federal government to recognize the diversity of individual Indian tribes.* This section is also intended to emphasize the need for the Federal government *to consider tribal needs on a tribe-by-tribe basis, and to move beyond the tendency to develop "generic" policies applicable to all tribes* regardless of needs or conditions. (emphasis added) S. Rep No. 100-274 (1987) 16.

We understand that the IHS believes tribal preference programs would be appropriate. Among the possible options which could be explored is to limit tribal preferences to those contracts which serve only one tribe; to leave the decision on Indian preference to a tribe through legislative or executive action in the form of an ordinance, statute or written executive order. Another approach would be to allow tribal preference as a first tier preference with Indian preference as a second tier preference approach.

In order that the Act be implemented as intended, the option of tribes to develop and implement tribally affiliated preference systems for employment and contracting should be encouraged and allowed in these regulations. Such an approach would foster and enhance the development of tribal self-government and ensure the development of reservation economies.

Scope of Construction Contracting

Subpart J of the proposed regulations addressing construction, is in need of revision. It must be revised to eliminate from its scope several ongoing BIA programs. More specifically, the Housing Improvement Program (HIP) and the Roads Construction and Maintenance Programs. The Navajo Nation and other tribes have contracted these functions for several years. This matter has been raised throughout the past 4 years of regulation drafting by tribal representatives and at times agency officials have said these programs are not within the coverage of Subpart J. In the current draft that is not clear. As written Subpart J will needlessly increase the burdens on these programs.

The lack of clarity appears to be caused by a combination of factors, first the definition of construction in section 900.102 of the proposed regulations is very broadly written; second Subpart J is entitled Construction Contracts but there is no definition of that term in either the Act or the regulations; finally section 900.1001 states that the scope of Subpart J applies to construction of Federal facilities and Tribal facilities. While the HIP and Roads programs represent construction generally i.e. "something gets built," these are not the construction, improvement or repair of tribal or federal facilities as provided for in Section 900.1001 of the regulations. In order to avoid conflicts between tribes and federal contracting officers in the future it should be made clear that ongoing programs such as the HIP and Roads programs are not subject to the provisions of Subpart J and/or federal acquisition regulations.

Possible alternatives for clarification include amendment of the construction program definition in Section 4(a) of the Act; amendment of the definition of construction in Section 900.102 of the regulations or amendment of Section 900.1001 to delete specifically such on-going programs from the Scope of Subpart J. The preferable approach would be to amend the statute to clarify that the term "construction contract" does not include these programs and that the federal acquisition regulations are not applicable.

Such an amendment has been submitted to Committee staff previously by Mr. Miller. This approach will avoid the necessity of tribes and tribal organizations seeking repeated waivers of the Subpart J provisions in every contract for these limited activities.

Such an amendment will ensure that the HIP and Roads programs continue to operate. Further it will avoid unduly complicating the contracting procedures for these programs, one of goals stated for the amendments when passed in 1988. By making it clear that such programs are outside the scope of Subpart J the services provided by such activities can more readily be delivered. The needs for housing improvement and road construction and maintenance in Indian country are significant. By streamlining and clarifying the applicability of these regulations delays in delivery of services can be avoided.

Trust Resource Program Contracting and Trust Responsibility Issues

Trust Resource programs have been contractible since the Act was originally passed in 1975. Historically BIA officials have resisted such contracts. Since the

1988 Amendments apply to other DOI functions it appears that the other agencies in Interior are similarly resistant.

The regulations contain several provisions which relate to trust resource contracts and contain a tone which again appear to make the contracting of such functions problematic. It is sadly ironic that DOI programs appear to wish to use these regulations as both a sword and a shield to frustrate the desires of tribes.

This tone is especially disconcerting when agencies of the Department of Interior other than the BIA, which have historically denied any trust responsibility, are the first to claim and attempt to rely on the trust responsibility as a basis to deny or limit contracts with tribes. It has been the Navajo Nation's and other tribes experience that the Minerals Management Service, the Bureau of Reclamation and the Fish and Wildlife Service, all within the Department of the Interior, have either denied any trust responsibility or alternatively acted inconsistently with the duties imposed by the trust responsibility on the United States. In view of that history it is insulting that those same agencies now seek to rely on the trust responsibility to frustrate the exercise of tribal self-government through P.L. 93-638 contracting.

The Navajo Nation would oppose any regulation which attempted to abrogate the trust responsibility as violative of the Act. The Nation's concern is that the provisions in Sections 900.106, 900.205 and 900.207 of the proposed regulations, when taken in combination will be used to unduly retard and restrict contracting by tribes with regard to trust resources contracts. In both Subpart A and Subpart B of the draft regulations it is interesting to note that several provisions appear to confuse the scope of the trust responsibility and to whom the trust duties are owed.

Section 900.106, addresses contractibility and in part relies on the trust responsibility to determine which functions are contractible. Functions are deemed to be non-contractible if they impair the Secretary's duty to maintain the trust responsibility.

In Subpart B of the proposed regulations several provisions appear to confuse the beneficiaries of the trust responsibility with "program beneficiaries." Clearly the beneficiary of the trust responsibility are Indian tribes and/or individual Indians. "Program beneficiaries" may or may not be Indians, since some functions performed by the DOI are for both Indian and non-Indian communities. The Bureau of Reclamation could have a water project which benefits both Indian and non-Indians. Similar programs are operated by the other agencies within the Department of the Interior. Presumably within those programs the functions related to Indians because of their states as Indians are contractible.

In the declination section of the regulations the Secretary is required to decline a contract when it relates to the Secretary's performance of a trust responsibility if there are "unresolved conflicts of interest between the contractor and the beneficial owners of the trust resources served under the contract."

In the section which addresses the contents of the contract proposal, a description of conflicts of interest "between tribes and other beneficiaries of the program" is required.

The potential for confusing beneficiaries of the trust responsibility must be clarified. The Navajo Nation is concerned that such provisions will be interpreted in a manner that a contract proposal which seeks to contract a portion of a program with both Indian and non-Indian service recipients will be denied by treating the non-Indians as beneficiaries of a program. Further, agency officials may attempt to use these provisions to foster conflict between Indian beneficiaries to avoid contracting for a function or portion of a function. Such situations undermine the purpose of the Act but appear possible due to the drafting of the regulations. Such conflicts might include competition between tribes for contracts or conflicts between tribes and their members.

Perversely rather than reducing barriers to contracting the proposed regulations are more limiting than current regulations. The disclosure of a conflict of interest is required in 25 CFR section 271.33 but such conflicts of interest are not listed as a criteria for declination in 25 CFR section 271.34. In this regard it appears that when DOI was confronted with a statutory scheme intended to facilitate contracting further obstacles have been created in the regulations.

This is clearly inconsistent with the tribal-federal "joint effort" which this Committee discussed and has fostered through the 1988 Amendments to the Act:

> The intent of the law is to enable tribes to improve the protection of trust resources by operating the technical functions relating to trust responsibility while preserving the Federal Government's obligation as trustee for Indian lands and resources. (emphasis added) Senate Report 100-274 (1987) 25.

At a minimum these sections of the regulations as well as any others which reference the trust responsibility should be closely reviewed to ensure their consistency with traditional notions of the trust responsibility. Any other approach violate the duties created for federal agencies and officials in dealings with Indians.

It is imperative that the agencies, within DHHS and DOI adequately and completely understand the trust responsibility. One aspect of the trust responsibility commonly overlooked is the duty of loyalty in an agency's dealings with tribes. such duty requires subordination of agency interests to those of the beneficiary absent clear Congressional action to the contrary. See, Cohen, Handbook of Federal Indian Law, (1982) pp. 225-228.

Conclusion

The issues I present here have been coordinated with the other panelists, Mr. Miller and Mr. Dean, I share the views of my fellow panelists on the other matters discussed today.

The Navajo Nation suggests that the Committee consider further legislative action to resolve the issue presented today. That approach has been supported by Tribes across Indian country, it currently appears as the best course to realize the intent of the 1988 Amendments.

Thank you for the opportunity to present these comments.

PREPARED STATEMENT OF EDDIE F. BROWN, ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and Members of the Committee. I am pleased to be here to discuss the proposed regulations to implement the 1988 amendments to the Indian Self-Determination and Education Assistance Act.

The Indian Self-Determination and Education Assistance Act of 1975, (P.L. 93-638, 88 Stat. 2203) was amended in 1988 (P.L. 100-472, 102 Stat. 2285). In the Act, Congress declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and the Indian people as a whole, through the establishment of a meaningful Indian self-determination policy. The policy further provided for an orderly transition from Federal domination of Indian programs and services for Indians. It also provided for maximum Indian participation in the planning, conduct and administration of such programs and services.

While there has been progress over the years, Indian tribes have experienced considerable frustration and numerous problems in attempting to accomplish the intent of the legislation. In the proposed regulations, we have attempted to clarify, streamline, and improve the process of transition from Federal domination of programs to tribal control by eliminating burdensome regulations and reducing the costs for tribal contractors. The regulations to implement the amendments will expedite contracting by Indian tribes and tribal organizations.

The 1988 amendments expanded Public Law 93-638 contract that in a number of significant areas and provided guidance on how the new regulations should be written. The amendments extended the scope of contract authority to encompass other bureaus and offices within the Department of the Interior (DOI) and the Department of Health and Human Services (HHS) in addition to the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS). The 1988 Act provides that all requirements placed on Indian contractors be addressed in the regulations and Indians participate in the drafting of the regulations. The legislative history also recommended that a joint rule be published by both Departments. Given these requirements and the numerous changes in the Act, the BIA has been working continuously with both Departments and Indian tribes in the development of the regulations.

In the spirit of self-determination, HHS through IHS and the DOI through the BIA have taken extraordinary measures to seek and include the recommendations of the Indian people in the drafting of these regulations.

During the month of November 1988, the BIA and IHS held meetings in Arlington, Albuquerque, Aberdeen, Seattle, Sacramento, and Tulsa, to discuss the 1988 Amendments with tribal representatives. Nationally, over 1,200 people attended these joint BIA/IHS sessions.

The BIA and IHS subsequently held a joint Regulations Drafting Workshop (DRW-I) with approximately 300 tribal representatives in Nashville, a follow-up workshop (DRW-II) was held in Albuquerque. A working document was produced as a result of these two workshops.

In October 1989, a joint BIA/IHS letter was issued to indicate the decision of the two agencies to develop joint regulations. In December of 1989, the BIA and IHS

jointly released a preliminary set of draft regulations for tribal comments. In January and February 1990, 13 regional consultation meetings were held with tribal representatives to discuss the joint draft regulations, and to collect tribal comments. In March 1990, the BIA and IHS accepted recommendations from tribes to recognize and permit designated tribal representatives to participate in joint sessions to revise the December 1989 joint draft regulations. These participants designated as the Coordination Work Group (CWG), began their first session in March of 1990 and continued to meet periodically until the end of August 1990. In September 1990, a new set of draft regulations was issued reflecting the views of the CWG.

Throughout the following year, each Department conducted preliminary reviews and clearance of the draft regulations. The Secretary of HHS reviewed and endorsed the positions on the major issues reflected in the draft regulations. In December 1990, the Secretary of DOI issued a memorandum setting forth the Department's policy on implementation of the Act, and formally set forth the DOI review and clearance process for the draft regulations, including review by the Departmental Review Team (DRT). This team was composed of representatives of all DOI offices. A Departmental Policy Group (DPG), composed of all DOI Assistant Secretaries and the Solicitor reviewed the draft regulations for the resolution of certain issues.

Revisions were made by each Department reflecting the result of this preliminary clearance and each Department issued its own revised draft regulations in November 1991. A negotiation team appointed by each Department was to meet and negotiate joint final regulations. The first joint meeting of the DOI and HHS negotiation teams was held in June 1992. Weekly meetings continued throughout the Summer of 1992, and the final joint DOI/HHS draft regulations were essentially completed by October 1992.

In December 1992, the DOI submitted these regulations to the Office of Management and Budget for review and approval prior to publication in the Federal Register as a Notice of Proposed Rulemaking. Because of the change in Administration the proposed rule was returned to the DOI by OMB to allow the new Administration an opportunity to review it. The Department has begun the process of reviewing the draft proposed regulations to determine whether they are consistent with Administration policy. while we recognize that these regulations have been a long time in development, their significance requires that they not be published as proposed policy without a careful review.

The Department intends, however, to expedite the process to the greatest extent possible.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

PREPARED STATEMENT OF MICHAEL LINCOLN, ACTING DIRECTOR, INDIAN HEALTH SERVICE, ROCKVILLE, MD

I am Michael Lincoln, Acting Director, Indian Health Service (IHS). I am accompanied by Ms. Athena Schoening, Deputy Associate Director, Office of Tribal Activities, and Mr. Gary Hartz, Director, Division of Environmental Health. We have been engaged in a long and complex process of drafting regulations to implement the 1988 amendments to the Indian Self Determination Act, Public Law (P.L.) 93-638. The process has already taken over four years but we believe that the current proposal reduces Federal control of tribal programs, strengthens tribes' opportunities to assume control of their programs through the self determination contracting process, and considers the needs of both tribes that wish to contract and tribes that choose not to contract under P.L. 93-638.

The development of the regulation has taken longer than we anticipated. This is a result of the broad scope of the statute, the complexity of the issues, the varying perspectives of the parties, the need for tribal participation, and the need to address the administrative, management, and program needs of two Departments.

Tribes have participated in the drafting of the regulations. Throughout 1989 and 1990, IHS and the Bureau of Indian Affairs (BIA) met with tribal representatives in national meetings and various workgroup sessions. In September 1990, a draft was completed reflecting the discussions of the workgroup participants with the understanding that it would be reviewed by both Departments in developing a joint proposed regulation for publication in the Federal Register.

Through 1991, staff of the IHS and the BIA, joined by representatives of other programs and staff offices of the two Departments, reviewed the September 1990 draft. In November 1991, the IHS and the BIA distributed separate staff drafts reflecting their agreements with each other and with the September 1990 draft as

well as areas of disagreement between the Departments. Each Department subsequently appointed a Negotiation Team to meet and negotiate joint language for the regulation proposal. The first Negotiation Team meeting was held in June 1992. Weekly meetings continued throughout the summer of 1992, and the joint Department of Interior (DOI)/Department of Health and Human Services (DHHS) draft proposed regulations were essentially completed in October 1992.

A joint Notice of Proposed Rulemaking (NPRM) cleared both Departments in January 1993 and was forwarded to the Office of Management and Budget (OMB) for clearance. Simultaneously, copies were sent to the appropriate congressional committees and to tribal representatives. However, in February they were returned by the OMB to provide the new Administration an opportunity to review and clear the NPRM before it is published in the Federal Register for comment. In DHHS, the regulations are currently pending clearance by the Secretary. Copies will be sent to the appropriate congressional committees after clearance by the Secretary, DHHS.

Staff of the DHHS and the DOI met with tribal representatives in March 1993 to present the draft proposed regulations, explain positions taken, and help prepare the tribes for the upcoming formal comment period. A national meeting is planned during the comment period to respond to questions by tribal representatives and receive formal comments on the NPRM. As you are aware, various tribes still disagree with certain portions of the current proposal. These and all issue raised during the formal comment period will be addressed in developing the final regulation according to the requirements of the Administrative procedure Act.

Notwithstanding the status in the development of the regulations, the IHS has implemented many provisions of the 1988 amendments in advance of the final regulations.

We have attempted to balance the obligations of the Departments to account for Federal funds and oversee programs with the tribes, desires to assume control over their programs and be more responsive to the needs of their communities. I would be glad to answer any questions you may have regarding the regulation drafting process.

TESTIMONY

by

Bennie Cohoe, Executive Director
Ramah Navajo School Board, Inc.
Pine Hill, New Mexico

May 14, 1993

Introduction

Even before the passage of the Indian Self-Determination & Education Assistance Act of 1975, the Ramah Navajo School Board, Inc., (RNSB) had been organized and was contracting with the federal government for educational services. With the passage of P.L. 93-638, a vehicle was provided by which RNSB could expand services to the local community to support their struggle for self sufficiency through education in a holistic and comprehensive sense. Now in its twenty-third year of operation, RNSB has become a model of self-determination managing 25 contracts and grants, operating 60 closely coordinated programs, with an annual budget of 10 million dollars. RNSB deals with numerous agencies in the contract and grants process including the Bureau of Indian Affairs (BIA), the Indian Health Service (IHS), Department of Education, Department of Labor, the Navajo Nation, and the State of New Mexico. Educational programs for the community are supported by health services, social services, a housing program, a radio station, a youth group home, a jobs training program, and numerous other community programs.

RNSB, although contracting numerous federal programs pursuant to P.L. 93-638, has not exhausted all of the opportunities that exist for expanded contracting. As an example, our intent has been

expressed to IHS to contract Ramah Navajo's fair share of community mental health services. The Area Office of Tribal Activities has just this week delivered on the request for program information that was outstanding for over 6 months, so we will be submitting a proposal for contracting mental health services in the summer months. At the same time, we contemplate contracting our fair share of other community health services in the near future, which are now controlled by IHS at the Service Unit. The Indian Self Determination Act, its expressed federal policy, and its intent and spirit has been a driving force in the development of the Ramah Navajo community where virtually nothing in the way of needed services existed thirty years ago. We consider the Act of 1975, and its subsequent amendments, to be the most significant piece of Indian legislation passed by the U.S. Congress in its history. However, it must be stated that significant problems with the agencies implementation of the original Act, and more recently, the 1988 Amendments, continue to plague RNSB and other tribal contractors.

P.L. 100-472 Provides New Impetus for Self Determination

The passage of P.L. 100-472 in 1988, called for regulations to be developed with meaningful tribal participation and held the hope, for us, that the spirit and intent of the federal policy expressed in the original Act of 1975 would now finally be embraced by the federal agencies. It held the hope that obstacles in the contracting process implemented after 1975, would be removed and new doors of opportunity would be opened to move Indian Self

Determination forward. Five years later we have no implementing regulations.

RNSB pitched in enthusiastically with the joint tribal/agency regulation drafting process. Thousands of RNSB staff hours have been spent, over the past five years, participating in and monitoring this process. Much has been contributed to the process by our organization including attendance at Tribal-Federal Coordinating Workgroup meetings, suggested regulatory language, review of joint drafts, and submission of copious written comments. However, the door was closed to our participation two years ago and the agencies did not produce their final work product until February of this year. Many provisions in the regulations had changed during the interim while the federal position on major areas of disagreement with tribes had become further entrenched in the federally drafted language. While we want to see the final product, we want to see it done right! We do not believe the current federal joint draft regulations measures up to the intent of Congress.

Federal Agencies Fail to Fully Embrace Self Determination

While central features of the Act include the transition from the federal domination of Indian programs to tribal control and local flexibility to redesign those programs, the current joint agency draft seeks to limit what can be contracted and how it can be contracted. A stated policy of promoting tribal contractor flexibility and discretion is undercut by requirements on the contractor to adopt agency standards and reporting systems. Tribal

program standards, according to the draft, "... may not be less than standards which are currently being applied in the program as operated by the Secretary." Tribal reporting of data in health contracts must be "... compatible with the Core Date Set Requirements of the IHS reporting systems." BIA ... "contractors shall adhere to all program standards to which the Federal agency is subject ... including ... policies, agency manuals, guidelines, industry standards, and personnel qualifications ..."

This federal agency philosophy of narrow implementation reflected in the current draft regulations runs counter to the spirit and intent of the Act. It is a philosophy of the past that serves to inhibit the growth of federal contracting and promotes the continued federal domination and control of programs. It establishes a strong pretence for not entering into a contract because: 1.) the function or program may not even be contractible according to the agency interpretation of the limitations set out; 2.) the portion of the federal program to be contracted cannot be divided; or 3.) the program may not be maintained properly due to not meeting agency, or agency-like standards. RNSB and other tribal representatives have found these views to be particularly contrary to the legislative history specific to these issues. Senate Report 100-274 on the 1988 Amendments was quite clear about imposing unnecessary agency policies and compliance and reporting requirements on tribal contractors through memoranda, manuals, agency guidelines, or other administrative procedures and methods used by the agencies for their internal operations. Yet the federal agencies set out to do precisely that in the draft

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regulations by now having their policies codified. The Senate report held that reporting requirements were to be negotiated with tribal contractors. The agencies have consistently resisted establishing in regulations that standards and reporting requirements be negotiable on a contractor by contractor basis despite a wide array of local differences, local preferences, and locally available funding, equipment, and technical assistance (see Attachment 1). When asking a federal official where a tribal contractor would get the resources to meet some of these draft requirements we were told, "Just eat it like the agencies have to do."

Direct Contract Support Cost Funding

A major issue of importance to RNSB and tribal contractors nationally is an unresolved one, still outstanding since the passage of P.L. 100-472, and one that will remained unresolved if the current federal draft regulations are published in final form. This is the issue of Contract Support Costs, particularly direct contract support costs. The Act as amended provides for two basic types of funding for tribal contracts. These are direct Secretarial funding and contract support costs funding. The latter category consists of those reasonable costs for activities that a contracting tribal organization must undertake to ensure compliance with the contract terms, and for the prudent management of the contract, but which the agency does not have available in its budget to include in the contract as part of the Secretarial amount. The Secretary may not currently be required to carry out

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some of these administrative type activities in his direct operation of the program (such as preparing an annual audit or conducting governing board activities). Or he, or other parts of the federal government, may be providing some of these activities from resources other than those in his direct operations budget (such as legal advice or payroll). There is a two-part mechanism for funding these contract support costs: 1.) the indirect cost method where tribal contractors pool administrative costs and negotiate an annual rate with the Office of the Inspector General, and that rate is applied against a direct base to determine indirect cost funding; and 2.) the direct costing method for contract supports costs that are not included in a tribal contractor's indirect pool.

Tribal contractors use either the indirect cost method, the direct contract support cost method, or a combination of both to identify these costs. Not all administrative type costs can be pooled using the indirect cost method because the Inspector General may not have historically allowed them; nonetheless, tribal contractors must receive funding for them in order to prudently manage their contracts. If funding for these costs is not received, the alternative is to pay for them with direct Secretarial program funding, thereby taking precious funding away from direct health services.

IHS Contract Support Policy Causes Contractor Shortfalls

IHS and BIA have dealt with contract support cost issues in different ways. In its recognition of the need to fund those

tribal contractor administrative costs that are not funded through the indirect cost method, the IHS developed and implemented a Contract Support Cost Policy in February 1992. RNSB participated extensively in the development of this policy to try and influence its language consistent with the Act and its intent (see Attachment 2). Despite all our attempts, the final product has significant deficiencies.

To begin, IHS has failed to address the needs of existing contracts, as distinguished from new or expanded contracts. Congress first funded Contract Support Costs in Fiscal Year 1991. In that year, RNSB undertook the negotiation of its contract support needs even though the IHS policy recognized only the funding needs of new and expanded contracts, and not those of existing and ongoing contracts. Today, three years later, RNSB has been awarded only 25% of its direct contract support cost need for FY 1991, although IHS has actually approved 61% of the need that we have presented. But to make matters somewhat like Catch 22, RNSB has been told that the amount we seek for FY 1991, when funded, cannot actually be used for our FY 1991 shortfall because of appropriations limitations. Our only recourse is to pursue a contract claim for that year.

The amended Act requires IHS to report all direct contract support cost shortfalls to Congress so that, when we finally agree on the amount, those costs which we incurred in FY 1991 will be covered and paid for that year and we won't continue to dig ourselves a deeper hole in each succeeding year. In defiance of the law, the IHS has not reported our contract support cost shortfalls

to Congress, nor does it appear they intend to do it. Meanwhile, we are over $200,000 behind for FY 1991, another $200,000 plus behind for Fy 1992, and this deficit will soon be tripled for FY 1993. How do we survive?

Contrary to the intent of the 1988 Amendments, our program funds are diverted to cover direct contract support cost needs. What would we do if these costs were fully funded? RNSB would then redirect its program funds back to direct services such as needed additional medical providers, nursing staff, and community health providers in the field. For $200,000 we could pay the salary and fringe of a full-time doctor to deal with an ever increasing workload, a full-time registered nurse to supervise support staff and deal with continuing quality improvement activities, an additional full-time community health nurse to provide services to individuals in their home environments, and a full-time health educator, a position totally lacking in the community but a core resource for full implementation of a public health model of care.

BIA Lacks Contract Support Policy

The BIA, while acknowledging the need to address direct contract support cost funding, has done nothing about it. Thus, RNSB and other tribal contractors are forced to use significant amounts of direct service funding for administrative type costs. The joint federal draft of regulations has failed to deal with this growing problem. RNSB feels strongly that relief, in this regard, will only come from technical amendments which clarify for the agencies what their responsibilities are in reporting the direct

contract support cost shortfall to Congress, so that the mandates of the Act for full and reasonable funding are met. Without the legislative relief, tribal contractors will not realize the same type of support for operation of their programs that the federal government enjoys when it operates the same program.

The Procurement Mentality in 638 Contracting is Endemic

Many other problems that we had hoped would be alleviated by the 1988 Amendments, and the subsequent "overhaul" of the regulations, still persist today. A major feature of the amended Act was to clarify that "638" contracts are not to be considered procurement contracts. Our sincere hope was that awarding authority would be removed from the BIA and IHS Contracting Officers, (as these individuals were and still are the locus for procurement activities) and assigned to other offices of BIA and IHS organization which are close to tribal issues and able to adjust to changing circumstances. For example, our BIA agency Superintendent is much more knowledgeable about our local contract needs and their legal context than individuals in the Contracting Office. He is also much more accessible. While early discussions in joint tribal/federal workgroups on the issue of delegating award authority outside of the Contracting Offices seemed promising, and later discussions in the context of BIA reorganization made the delegation of such authority to the Superintendent seem like a done deal, it never happened. In the IHS, we feel that the Office of Tribal Activities, the locus of the most knowledge of 638 and individual tribal circumstances, is a logical place to vest award

authority. It has not happened. Both agencies continue to award contracts through the Contracting Officer.

I am sad to report that the procurement mentality still looms over many of our contract transactions. Last year about this time, when we were presenting our annual contract budget to IHS for our current contract period (our contract has been mature since 1991), we were given a call by the Area Internal Auditor, who upon instructions from the Contracting Officer, was seeking to schedule a time for an on-site visit to perform a price/cost analysis of our proposed annual budget. Believing price/cost audits to be a thing of the past, a holdover from "procurement days," we tangled with our Contracting Office until the on-site price/cost analysis by the IHS Area Internal Auditor was called off. However, the Area Contracting Officer was still being required by Headquarters at Rockville to forward our budget there for a preaward review process before the Contracting Officer could sign the modification. This annual fiasco continues even though we have mature contract status and our year-to-year budgets do not radically change.

Recurring Day to Day Contracting Problems Persist

Another recurring problem, particularly with the BIA, is the difficulty of getting modifications processed with the funding posted correctly to the financial system so that we can actually draw down and make use of available funds. Within the BIA there are too many levels, accounts, and hands the funds must pass through before reaching RMSB contracts. We often find that a certain category of funding, a piece of which is our own contract

funding, reaches the Area Office, but is not placed in the appropriate account so that Area BIA personnel can affect the transfer to RNSB. It frequently must be traced by Central Office and then redirected properly. The result is often months of delay before we can actually make use of the funds to meet our obligations (see Attachment 3). This is not the direct funding relationship with the federal government envisioned by RNSB for its "638" contracts.

Yet another recurring problem is simply one of reasonable response time on communications to the federal agencies that involve various requests, typically for information on programs and funding. These requests often go unanswered unless follow-up phone calls and additional letters are written akin to a full-court press in a basketball game. An inordinate amount of time is wasted simply moving agency personnel to do their jobs. Many agency personnel seem more interested in moving requests off of their own desks and on to someone else's than taking the time and the responsibility to respond to the request in order to resolve the issue. As contractors, quite frankly, we sometimes view this as purposeful rather than just bureaucratic muddling (see Attachment 4).

The Federal Agencies Pursue Promulgation of Regulations Outside the Joint Tribal/Federal Process

Lastly, I would like to make the Committee aware of regulatory activities by the federal agencies in the past few years which have a direct bearing on contracted programs pursuant to the Indian Self

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Determination Act, but which have been conducted quite apart from the joint tribal/federal process to draft a set of comprehensive regulations that effect "638" contractors. On the IHS side, despite significant tribal concerns, there has been published in the Federal Register a notice of Core Data Set Requirements (CDSR) (August 7, 1990). The CDSR, which is really the entire set of IHS management information systems for each program, is being positioned by the IHS to be made a wholesale requirement in regulations by reference without the benefit of contract negotiation based on local conditions and circumstances, including the availability of funds and the availability of technical assistance (see Attachment 5). And the placement of the CDSR in regulations will certainly have been done without the significant and meaningful tribal participation required by the 1988 Amendments.

On the BIA side, regulations were proposed and finalized on the Housing Improvement Program (HIP) (Federal Register, January 27, 1992), and proposed for Financial Assistance and Social Services Programs (NPRM target date November 1991). Although HIP and Social Services Program are significantly tribally contracted, both sets of regulations were drafted outside of the national joint process to draft "638" regulations, with little or no tribal participation, and put on a "fast track" for publication. Fortunately, the proposed Social Services regulations have not surfaced again since August 1991 (see Attachment 6). Unfortunately, HIP regulations were finalized with scarcely a notice in Indian Country. The now current regulations have taken what was called

the HIP Model Contract, a generic BIA policy applied across the board to all tribal contractors, and codified it. As with the proposed Social Services regulations, vague references are made to past audits and congressional mandates that allegedly create the need for these regulatory changes to HIP. Even today, controversy stirs within the BIA on HIP, primarily as the result of problems with Bureau-run HIP programs, which we fear will eventually spell trouble for our contracted program, and tribally run programs nationally. Over the years we have experienced ever decreasing funds for HIP, from a high of 300,000 dollars in the early 1980's to 100,000 dollars in the early 1990's, despite our significant identified community housing need. Along with decreased funding has come decreased program flexibility as reflected in the current regulations (see Attachment 7).

Summary

Senators, all that I have expressed to you does not comport well with the intent expressed by Congress in the federal policy of Indian Self Determination contained in the original Act, the 1988 Amendments, and their legislative histories. The resolution to these problems certainly does not lie in the implementation of the current joint federal draft regulations. I believe that only legislative action can address the problems of self-determination contracting faced by RNSB and other contractors nationally. Where my people once suffered from lack of basic services, great strides have been made in the Ramah Navajo community because of P.L. 93-638. With your continued advocacy and assistance, we can improve the current situation and move with confidence into the future.

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ATTACHMENT 1

Program Standards and Reporting

(Letter to the BIA and IHS re: tribal positions on draft regulation language)

RAMAH NAVAJO SCHOOL BOARD, INC.

TELEPHONE:
(505) 775-3256
FAX: 775-3240

P.O. DRAWER A
PINE HILL, NEW MEXICO 87357

September 24, 1990

Ms. Athena Schooning, Director
Division of Self-Determination Services
Indian Health Service
Room 6A-05, Parklawn Bldg.
5600 Fishers Lane
Rockville, MD 20857

VIA TELEFAX
(301) 443-4666

Mr. Ben Nuvamsa, Coordinator 638 Project
Bureau of Indian Affairs
MS 4659-MIB
1849 C Street, NW
Washington, DC 20240

VIA TELEFAX
(202) 208-5585

Dear Athena and Ben:

Enclosed please find a copy of Subpart N, with tribal positions typed in as 'NOTES', which I promised to produce after the last Coordination Workgroup Meeting. Words in all caps are agency words and phrases proposed for deletion. Where proposing to replace deleted words or phrases with tribal language or where suggesting added language, these are in bold type within a 'NOTE'.

If you have any questions, please call me at (505) 775-3256. My FAX number is (505) 775-3240.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

Robert Newcombe

Robert Newcombe, Director
Health & Human Services

xc: Bobo Dean
Lloyd Miller
Bennie Cohoe
RNimw

ENCLOSURE

638 Negs done

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SUBPART N - PROGRAM STANDARDS, DEPARTMENT OF HEALTH AND HUMAN SERVICES

900.1401 Program Standards, Data, and Quality Assurance - Policy

(a) The provision of quality health services is the goal of both the Department of Health and Human Services and tribally operated health programs. Quality assurance programs, which include the collection and reporting of accurate data, are the means by which compliance with standards is measured, problems identified, and corrective action plans are developed and implemented TO ASSURE QUALITY SERVICES TO THE INDIAN PEOPLE. [NOTE: The tribal position is to delete this last phrase. While conventional quality assurance programs are a method for striving for quality of service in a health program, they should not be considered the sole means, or the universe, for assuring quality.] Program standards, data collection, and quality assurance are necessary, interrelated, and essential parts of a satisfactory health program.

(b) The Secretary shall establish a joint tribal/federal consultation process to review, and advise on departmental program standards, quality assurance programs, and core data set requirements. Modifications to the CDSR will be made to keep them to a minimum consistent with good management practices.

(c) Responsibility for the day-to-day operation of contracted health programs rests with the tribal contractor in accordance with the assurances set forth in the contract proposal and the resulting contract. This responsibility includes assuring that appropriate standards, data collection and reporting, and quality assurance programs are in place and maintained. [NOTE: In many cases, agency and tribal quality assurance programs are not in place and need to be implemented.

Additionally, these components of a tribally contracted program, in accordance with the Act, should be designed to be responsive to the needs and desires of the particular community. The following is a tribal rewrite of the last sentence of (c) above:

This responsibility includes assuring that appropriate standards, data collection and reporting, and quality assurance programs will be implemented and maintained in order to best meet the needs of the local community.]

[NOTE: A fundamental disagreement between agency and tribal representatives on this policy section is the agency's opposition to include tribally supported language which would make the incorporation of program standards, data, reporting, and quality assurance in a contract subject to negotiation on a contract by contract basis considering local conditions and circumstances. The agency wants to make these components definite requirements in regulation. Tribal representatives desire to avoid overly burdensome requirements which may have nothing to do with the operation of their contract or provision of services to their clients, and for which there may not be resources available. It is clear in the legislative history, regarding reporting and the CDSR, that Congress intended information needs are to be negotiated with tribes and that tribes may or may not consent, and compliance or non-compliance is not to be used by the agency as a threshold issue (SR 100-274 p.21). It is also abundantly clear by the declaration of policy in the Act that programs are to be responsive to the needs and desires of Indian communities. Consequently, the following language is proposed for paragraph (d):

(d) Incorporation of program standards, data collection, reporting

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and quality assurance in a contract to operate a program or portion thereof will be subject to negotiation between the agency and the contractor based on local conditions, availability of adequate federal appropriations, contractor staffing and training capacity, data processing capacity, and the availability of technical assistance.

(e) Nothing in this subpart is intended to create any additional declination or reassumption criteria.

900.1402. Program Standards, Data and Quality Assurance - Assurances.

The following assurances must be included in proposals, contracts, and contract modifications:

(a) Assurance on program standards. The contract proposal shall include an assurance that the contractor will comply with appropriate national, State, professional, agency or tribal standards. The assurance will identify which standard will be used.

(1) Joint Commission on the Accreditation of Hospital Organizations (JCAHO) or Health Care Finance Administration (HCFA) accreditation or conditions of participation are applicable. Their identification in the Assurance will be sufficient without further specification in the contract proposal.

(2) Where JCAHO or HCFA standards are not applicable, the contractor shall submit with its Assurance a copy of the standards proposed for use or provide sufficient detail to enable the evaluation of their appropriateness for the provision of quality health services.

(b) Assurance on data collection and reporting. The contract proposal shall include an assurance that the contractor will maintain, or establish and maintain, a data collection and reporting system that will provide the data necessary to plan, direct and assure the delivery

of quality health care services AND PROVIDE FOR THE REPORTING OF ACCURATE AND COMPLETE DATA COMPATIBLE WITH THE CORE DATA SET REQUIREMENTS (CDSR) OF THE IHS REPORTING SYSTEMS WHICH ARE APPLICABLE TO THE PROGRAM OR PROGRAMS TO BE COVERED BY THE CONTRACT. [NOTE: Tribal representatives believe reporting requirements should be negotiated consistent with the intent of Congress as reflected in the legislative history and propose the deletion of the phrase in all caps above.]

(1) The contract proposal shall indicate whether the contractor will use the IHS data collection and reporting system or the contractor's own manual or automated system.

(2) The contractor is not required to use the IHS data collection and reporting system so long as the contractor's own data collection and reporting system provides for the transmission of accurate and complete data at least quarterly or as otherwise required TO MEET THE CORE DATA SET REQUIREMENTS OF THE APPLICABLE IHS INFORMATION SYSTEMS. [NOTE: The tribal position is to delete the last phrase in all caps as it defeats the Congressional intent that needs for statistical information for reporting purposes is to be an item of negotiation, and that tribal organizations may or may not consent. Additionally, the phrase 'BY THE CONTRACT' should be added after "... or as otherwise required" to reinforce the negotiable nature of reporting requirements on a contract by contract basis.]

(3) The contractor's data collection and reporting systems, if automated, must also meet the applicable automated record security requirements of the Computer Security Act of 1987, P.L. 100-275. [NOTE: Tribal representatives question the general applicability of this act to tribal organizations.]

(c) Assurance on quality assurance. The contract proposal shall include an assurance that the contractor will establish and maintain a quality assurance program which includes evaluation components to assess MANAGEMENT AND program processes; measure compliance with applicable standards; identify problems which are important to the delivery of adequate health care; and develop and implement corrective action plans. [NOTE: Tribal and agency representatives had originally agreed to strike 'MANAGEMENT AND' from the sentence above. It remains the tribal position to do so as the inclusion of evaluation of management processes is a new resource issue never before addressed by the IHS. Assessment of 'program processes' is adequate for the purposes of the regulations.]

900.1403 Program Standards, Data and Quality Assurance - Implementation.

(a) When a tribe or tribal organization wishes to assume management of a program, the Secretary shall make available all program standards, data reporting requirements quality assurance requirements, including risk management plans, used in the operation of the program or activity proposed for assumption.

(b) REQUESTS FOR CONTINUATION OR ANNUAL FUNDING OF CURRENT AWARDS FOR PROGRAMS THAT DO NOT MEET THE REQUIREMENTS IN THIS SECTION OR WHERE THE UNDERLYING AWARD IS SILENT ON PROGRAM STANDARDS, PROGRAM DATA OR QUALITY ASSURANCE MUST MEET THE REQUIREMENTS IN 900.1402. [NOTE: Tribal representatives propose the deletion of this entire paragraph as it is repeated with more efficient language in (g) below. It is also appropriate to note here that the legislative history states that tribal compliance or noncompliance with reporting requirements is not to be used by Federal agencies as a basis for withholding or terminating

contract funds (SR 100-274 p.21).]

(c) The Secretary will provide technical assistance as necessary for development and implementation of a quality assurance program. [NOTE: The tribal position is that quality assurance programs are a resource issue and the words 'and funding', which have been deleted by the agency in the draft, should be reinstated after the words 'technical assistance' in (c) above.]

(d) The CDSR and any changes will be published as a notice in the Federal Register. It will be published before the regulations are final. Changes will be published after the regulations are final. [NOTE: Tribal representatives have no objection to publication of the CDSR and any changes in the Federal Register so long as any reporting requirements are subject to negotiation in the contracting process. However, if the CDSR is made a definite requirement in regulations for all contractors, then the tribal position is that changes to the CDSR must conform to the requirement of the Act that all Federal requirements for self-determination contracts shall be promulgated as regulations in conformity with sections 552 and 553 of Title 5, USC (section 107(a))], and only after a substantial tribal consultation process.]

(e) No additional reporting requirements will be imposed without agreement of the tribal contractor except as may be required by law, such as section 602 of the Indian Health Care Improvement Act. [NOTE: Tribal representatives question the general applicability of section 602 to tribal organizations, or its meaning within the context of paragraph (e). A tribal rewrite of (e) is proposed as follows:

(e) No additional reporting requirements will be imposed without

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agreement of the tribal contractor except as may be required by law specifically applicable to tribes and tribal organizations.]

(f) The Secretary will provide technical assistance to tribal contractors to enable them to convert their data into the formats and appropriate transmission media required by the IHS information systems.

(g) No distinction will be made between new, current, mature and term contracts or grants relevant to the applicability and implementation of the assurances with 900.1402.

(h) THE PROGRAM STANDARDS PROVIDED FOR IN 900.1402 MAY NOT BE LESS THAN STANDARDS TO WHICH THE SECRETARY IS HELD BY LAW. In carrying out the contract, the tribal contractor may not be required by the Secretary to adhere to any standards higher than those identified in the assurances as provided in 900.1402. [NOTE: Tribal representatives question the general applicability of laws to which the Secretary is held being also applicable to tribal organizations, unless specifically made applicable to them. The tribal position is to delete the first sentence in all caps above from paragraph (h).]

(i) Nothing in this subpart is intended to preclude tribal contractors from modifying health priorities within individual programs or services to better meet the health needs of their people, so long as such modifications are compatible with and are covered by assurances set forth in 900.1402.

(j) The cost of operations to meet the requirements of this entire SECTION is an allowable cost under a self-determination award, whether it be a contract, grant, or cooperative agreement. THE SECRETARY SHALL REIMBURSE THE CONTRACTOR FOR ANY REASONABLE COSTS TO MEET THE CDSR BEYOND THOSE COSTS WHICH WERE INCLUDED IN THE PROGRAM PRIOR TO THE

EFFECTIVE DATE OF THESE REGULATIONS. [NOTE: The word 'SECTION' above should be replaced with the word 'subpart', as it is the tribal position that the entire subpart deals with requirements which are all resource issues. Additionally, the last sentence above in (j) is limited in scope to the CDSR and should be replaced with the following language which is more comprehensive and consistent with the Indian Health Care Amendments of 1988 and the intent of the Self-Determination Amendments:

The Secretary shall provide each contractor with automated information systems to meet their information needs and to allow reporting to IHS for data under the CDSR which has been negotiated as a part of the contract, and shall reimburse the contractor for the cost of operation of such systems.

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ATTACHMENT 2

IHS Contract Support Policy

(Letters to the IHS Area Director and OTA Director re: Contract Support)

RAMAH NAVAJO SCHOOL BOARD, INC.

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P.O. DRAWER A
PINE HILL, NEW MEXICO 87357

January 09, 1992

Through: Dorothy Dupree, Chief, OTA

RECEIVED
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AAO-IHS
TRIBAL HEALTH PROGRAMS

Josephine Waconda, Director
Albuquerque Area Indian Health Service
505 Marquette NW, Suite 1502
Albuquerque, NM 87102

Dear Ms. Waconda:

The Ramah Navajo School Board, Inc. (RNSB), has been closely following the development of the IHS Contract Support Policy. Mr. Ronald Demaray of my staff shared a conference call regarding the draft policy with Ms. Dupree of your staff on December 27, 1991, and has spent considerable time reviewing the January 2, 1992, draft of the policy. While the RNSB has been one of the greatest proponents of a contract support policy, we feel that the current version provided to you by Headquarters OTA continues to fall short of our expectations and the intent of PL 93-638 as amended.

The draft policy has been in the works since December 1990. The most current draft will be discussed with Area Directors in a conference call on Friday, January 10, 1992, at 2:00 PM EST, and you will be asked to make a recommendation to Dr. Rhoades for approval or disapproval of this policy. While the most recent draft has shown dramatic improvement over the first draft, it continues to suffer from two very significant deficiencies which we present for your consideration.

First, the policy continues to remain silent with regards to direct contract support for pre-1988 contracts. These contracts are called "Ongoing Contracts" in Section 6 of the draft policy. On the December 27th conference call, Ms. Athena Schoening had conceded that not all ongoing contractors may have received their full need for direct contract support under the initial distribution of the 22 million appropriated by Congress for direct contract support costs (RNSB is an example). She also agreed to make a reference in the current draft policy about the need to review under-recoveries of pre-1988 contractors. This has not been done.

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RNSB strongly believes that Section 5(1) of the draft policy should also be made applicable to ongoing contractors. Further, we are of the opinion that the direct contract support costs (like indirect costs) should be nonrecurring. They should be determined annually based upon need and reasonableness. Section 105 (c) (2) and Section 106 (b) (5) of PL 93-638 as amended clearly support the need for an annual renegotiation of the 106 (a) contract amounts based upon changed circumstances.

The policy as drafted seems to support a onetime distribution of direct contract support costs and from then on contractors must live within that amount regardless of changed circumstances. This is not the intent of Congress. It seems as though the Agency is failing to recognize that the only difference between indirect and direct contract support costs are how they are accounted for. This ties into our second major concern which the IHS refuses to even talk about; the reporting of direct contract support deficiencies to Congress. The Agency refuses to do this based upon a very narrow reading of Section 106 (c) (2) of PL 93-638 as amended. We believe that the intent of the Act was to report to Congress on the deficiency of overhead type costs whether accounted for directly or indirectly. The Agency, while agreeing to report indirect contract support cost shortfalls to Congress, has declined to take responsibility for reporting <u>direct</u> contract support cost shortfalls to Congress. If this is institutionalized by policy, our only alternatives as a tribal organization will be to either ask Congress for yet another technical amendment to PL 93-638 or to seek relief through litigation. This consumes valuable time and resources which should be applied to improving the health status of our community.

In closing, we cannot support this policy as written and would recommend that your office withhold your support of the policy as it currently stands as well.

Sincerely yours,

RAMAH NAVAJO SCHOOL BOARD, INC.

Bennie Cohoe
Executive Director

Albuquerque Area Indian Health Board, Inc.

Alamo Navajo Chapter • Canoncito Band of Navajos • Jicarilla Apache Tribe • Mescalero Apache Tribe • Ramah Navajo Chapter
Southern Ute Tribe of the Mountain Ute Tribe • Pueblo Indian Health and Family Services, Inc • Urban Indian Health and Human Services, Inc

January 17, 1992

Josephine Waconda, Director
Albuquerque Area Indian Health Service
505 Marquette, N.W. - Suite 1502
Albuquerque, NM 87102

Dear Ms. Waconda:

The Albuquerque Area Indian Health Board had the opportunity to view the letter to you from the Executive Director of the Ramah Navajo School Board, Inc. regarding the issue of the proposed revision of the contract support policy. We concur with their statement "that the current version provided to you by Headquarters OTA continues to fall short of our expectations and the intent of the P.L. 93-638 as amended". As a P.L. 93-638 contractor, we are concerned that no mention is made regarding direct contract support for pre-1988 contracts. This must be addressed if we are to serve our constituents from a realistic funding level. Expediency will not serve us well if we fail to understand that such a position will place us in a position of continuously trying to catch up.

We support Ramah's position and know that we can count on you in this matter.

Sincerely,

Andrew Montaño
Executive Director

AM/sas

cc: Everett R. Rhoades, M.D.
Assistant Surgeon General - Director IHS
Dorothy Dupree, Chief OTA
Bob Newcombe - Ramah
xc: Bonnie Chee
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*ALASKA BAR

WERNER L. RADDATZ III
LEGISLATIVE SPECIALIST

January 9, 1992

VIA TELEFAX
(301) 443-4794

Douglas Black
Office of Tribal Activities
Indian Health Service
U.S. Dept. of Health & Human Services
Parklawn Building
5600 Fishers Lane
Rockville, MD 20857

Re: Contract Support Cost Policy (Our File No. 1826.33)

Dear Doug:

On October 24, 1991 I wrote to you at length regarding the draft contract support cost policy then under review by the Indian Health Service. The focus of that letter was the failure of the draft to deal adequately with the contract support cost needs of ongoing contractors. To date I have not received a response to my letter, although I have received a telefax copy of a January 2, 1992 draft contract support cost policy (identified as Indian Self-Determination Memorandum No. 92-2).

At the outset, I am concerned over the failure of your office to include me in the December 27 conference call convened specifically to discuss this draft policy. Although my office was open that day and I made special arrangements during the holiday season to be available for the call, the conference operator never called us and I assumed that, due to the holidays, the conference had been canceled and rescheduled. I should appreciate it in the future your office would make greater efforts to include me in conference calls regarding critical matters relating to 638 contracting that are so important to the tribal contractors represented by our firm.

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Returning to the substance to the draft policy, we are most concerned with the continuing failure of Part 6 to deal adequately with ongoing contracts. As outlined in my earlier October 24 letter, it is incontrovertible that ongoing contractors have received less than their full share of contract support costs, apparently due to congressional underfunding. An excellent example of this underfunding is with the Ramah Navajo School Board. In Ramah's case, a contract support cost budget was approved but only partially funded, requiring that direct program dollars be diverted to cover the Tribe's full contract support cost needs. This underfunding is clearly in violation of the requirements of section 106(a)(2) of the Act.

Part 6 should be revised to permit the annual renegotiation of contract support cost needs both in the area of contract support costs recovered as indirect costs and contract support costs recovered as direct costs. On this last point, Part 6 should specifically incorporate the procedures set forth in Part 5, including Part 5(1).

So long as the contract support cost policy fails to address the needs of ongoing contractors, the amount of total funds awarded to such contractors will be insufficient to meet the legal obligations of section 106 of the Act, and the Indian Health Service will be exposed to a continuing liability. Reliance on a simplistic "methodology" which awards such contractors three-quarters of 15% of their personnel costs is arbitrary and would in all likelihood be overturned in a court if challenged. We thus once again renew our request that the draft be revised to deal fully with the needs of ongoing contractors.

Our second major objection is in the failure of the contract support cost policy to recognize the legal requirement that the Indian Health Service report annually to Congress on any deficiencies in funding contract support cost needs. Although IHS apparently agrees that such deficiencies will be reported to the extent a contractor recovers its contract support costs in its indirect cost pool, IHS refuses to similarly report unfunded contract support costs recovered as direct costs. This position simply makes no sense and can only lead to continued underfunding of contracts toward no discernable positive end.

Finally, in our opinion the procedures set forth in Part 5(1) are confusing. The first set of six examples appears to prohibit certain items from being included in a contractors indirect cost pool, notwithstanding that the contractor and the cognizant agency may be in complete agreement to include such items in the pool. This is more than a theoretical objection, since some of our clients have approved indirect cost agreements which specifically include some of the listed items in the indirect cost pool. There is absolutely no justification for either restricting the scope of indirect cost negotiations in this policy -- a matter which is strictly up to the Office of Management and Budget and the cognizant agency -- or for absolutely prohibiting a contractor from recovering certain contract support costs within its

indirect cost pool. Although we understand this may, possibly, not be the intended reading of the draft, the use of the words "may not" in our opinion will have this effect.

We thank you for the opportunity, however short, to comment on the contract support cost policy. It would, however, be most helpful if in the future you could provide us with additional time to review each draft.

On a personal note I trust you had a happy holiday season and are looking forward to a healthy and prosperous new year.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: Lloyd Benton Miller

LBM/ms

ATTACHMENT 3

Contract Modification and Funding Problems

(Letter to the BIA Area Director

re: contract funding)

RAMAH NAVAJO SCHOOL BOARD, INC.

TELEPHONE:
505) 775-3256
FAX 775-3240

P.O. DRAWER 10
PINE HILL, NEW MEXICO 87357

May 4, 1993

Sidney Mills, Area Director
Albuquerque Area Office
Bureau of Indian Affairs
P.O. Box 26567
Albuquerque, New Mexico 87125-6567

Dear Mr. Mills:

During our meeting of Thursday, April 29, 1993 it became quite evident that several of the problems facing RNSB right now are a direct result of problems in the SPA Education Office. You asked that we provide you with a brief explanation, in writing, as to what some of the more pressing issues are.

While there are others, these are the most pressing education contracting issues which we would like your assistance in resolving.

1. Balance of FY 93 Special Education Contract funding ($112,314.00) must be added to our Special Education Contract CTM75X00103 immediately. The BIA has had our funding level identified for well over a year now, yet they fail to modify our contract to provide the funding. Other SPA contractors have received their funding. Despite a meeting on Oct. 30, 1992; correspondence of 9/11/92, 9/22/92, 1/7/93; and numerous phone calls; no communication has been forthcoming from SPA concerning when the contract would be modified.

2. Funding for our Chapter I Summer program has been approved at $15,900.00. These funds must be placed in our contract prior to June 30, 1993 or they will no longer be available. Given the delays on our Special Education modifications, we are concerned that this be done immediately.

3. Pine Hill Schools may well be facing a serious funding deficit this year similar to the problems experienced by some Bureau Schools. We wrote to Mr. Cordova on April 27 to request some relief through the ICWA funding which has been made available to the OIEP for SY 92-93 deficiencies. We request that this request be expedited due to the urgent nature of the problem.

4. The Ramah Navajo School Board, Inc. wrote to Mr. Cordova on April 23, 1993 requesting that our PL 93-638 Education Contracts be converted to PL 100-297 Grant Status effective July 1, 1993. We are anxious about this conversion and do not want to be faced with an inadequate amount of time to review the grant award documents and to negotiate the Grant Agreement. We request that BPA provide us with a sample award agreement to review and to tentatively schedule the negotiation so that we might better prepare for it.

5. An MOA allowing the Ramah Navajo Agency to continue to administer our Facilities Management Contract was discussed with Mr. Cordova months ago. Val was supposed to be providing us and the RNA Superintendent with a draft however to date, we have not received anything.

Thank you for hearing us out on these matters. We sincerely hope that these issues will be resolved shortly. If you have any questions, please contact Mr. Ron Demarey of my staff.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

Bennie Cohoe
Executive Director

xc: B. Reese, Superintendent
R. Demarey, Admin. Services
Chrono

BC/RD/lb

ATTACHMENT 4

Information Request Response Problems

(Letter to the IHS Director re: response on information request)

RAMAH NAVAJO SCHOOL BOARD, INC.

TELEPHONE:
(505) 775-3256
FAX 775-3240

P.O. DRAWER 10
PINE HILL, NEW MEXICO 87357

April 14, 1993

Josephine Waconda, Director
Albuquerque Area IHS
505 Marquette NW, Suite 1502
Albuquerque, NM 87102

Dear Ms. Waconda:

A request for information pursuant to our intent to contract Ramah Navajo's fair share of Service Unit Mental Health Services was sent to the Office of Tribal Activities (OTA) over 150 days ago (copy attached). Despite several contacts during this period with OTA staff on getting movement on the request, we still have no response.

Recent mental health issues that have arisen in the community, and the subsequent difficulties of mounting an appropriate and adequate response to them from the Service Unit, create a sense of urgency on our part to get this program contracted and controlled locally. The information requested is critical to planning and proposing our scope of work. I specifically request you to make it a priority to see that the IHS employees who have access to the various pieces of information in our original request assemble this information in a formal response to us as soon as possible, but no later than 15 working days from your receipt of this letter.

The serious time lag in responding to this Indian Self-Determination request does not seem to comport with Objective 2 of the Albuquerque Area Indian Health Service Strategic Objectives: to enable communities to assume responsibility for and control of their own health through the promotion of self determination. On the contrary, this represents to us either apathy towards, or resistance of, this objective by IHS staff.

It is still evident that only by the exertion of strong leadership over all IHS staff in the Area will your strategic objective on self-determination be realized. I respectfully ask for your leadership, in this instance, to assist us in assuming control of mental health services locally with a minimum of further delay.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

Bennie Cohoe, Executive Director

BC/RB/mc
ATTACHMENT

RAMAH NAVAJO SCHOOL BOARD, INC.

TELEPHONE:
(505) 775-3256
FAX 775-3240

P.O. DRAWER 10
PINE HILL, NEW MEXICO 87357

November 10, 1992

Burnett Whiteplume, CPLO
Office of Tribal Activities
Albuquerque Area Indian Health Service
505 Marquette NW, Suite 1502
Albuquerque, NM 87102

Dear Mr. Whiteplume:

Pursuant to our meeting with you and other IHS staff on October 29, 1992, regarding RNSB's request to contract Mental Health Services, the following concerns, questions, and requests for information are made for your response:

1. The Service Unit Mental Health budget as presented to us on October 29, included $18,070 Child Care's Mental Health Services funds already included in our 638 contract. These funds are therefore not part of the consideration of funds available to be contracted and should be removed from any final equation in distributing mental health funds to the prospective tribal contractors.

2. The fringe benefit figures for the three positions presented to us were estimated. We request the actual figures for FY92, as well as the projected figures for salary and fringe for FY93, and we further request that the fringe benefits be broken down by category. It is our understanding that funding for fringe benefits will be provided as a direct contract support cost and is not included in the direct program base.

3. Please send us information related to the GM grade of pay explaining how it is administered and what additional benefits/allowances/bonuses are allowed within this grade.

4. A GSA vehicle is shown budgeted at $3600. What was the actual expenditure for the vehicle in FY 1992?

5. From the Zuni Ramah Navajo Service Unit Feasibility Study conducted in 1989, we understand that secretarial/clerical support is provided the Service Unit Mental Health Program part-time by a Social Service position. The costs of salary, fringe, and other support costs attributable to Mental Health by this position should be identified and provided to us.

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6. A number of cost items typically carried in program budgets, or supported by Area, or otherwise supported from a source outside the program were lacking in the budget presented to us. These include but may not be limited to:

a. Travel
b. Supplies
c. Training
d. Recruitment & Retention
e. Equipment Leases
f. Contracted Services
g. Communications

We request the figures related to these items, and others that may not be named here. What were the actual expenditures for the Mental Health staff and program in these categories in FY92?

7. We request an inventory of equipment and furnishings attributable to the Mental Health Program at Blackrock.

8. We need to know the specific reporting requirements (Core data set) that the Service Unit Mental Health Program currently provides the IHS system. The what, the when, and the how of their current reporting needs to be conveyed to us. Any ADP equipment and software necessary to accommodate their reporting requirements should be identified.

9. We request the level of need funded in the Service Unit Mental Health Program as expressed by a ratio of actual staff to RPMMA staff for the Service Unit as a whole be provided to us. What are the projected staffing levels for the Service Unit Mental Health Program for 1995 and 2000?

10. We request data on FY90, FY91, and FY92 regarding total encounters by the Mental Health Program (Service Unit staff only) for the Service Unit as a whole and broken down by Zuni and Ramah Navajo. Additionally, we would like to know how many of the encounters for Ramah Navajo patients took place at Blackrock and how many took place in the Ramah Navajo community. Any other available data related to these encounters is welcomed.

11. We request data on FY90, FY91, and FY92 mental health diagnosis admissions to the PHS Hospital at Blackrock or O.I.M.C. identified by Zuni and Ramah Navajo tribe.

12. We request data on FY90, FY91, and FY92 Contract Health Services admissions from Blackrock for mental health diagnosis showing total expenditures and identified by Zuni and Ramah Navajo tribe.

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13. We request information on revenue generated by Mental Health billing for FY90, FY91, and FY92.

14. We request information on any special allowances from Area Office which have been used to support the Mental Health Program at the Service Unit.

15. We request information on any Medicare/Medicaid collections used to support the Mental Health Program at the Service Unit in the past three years.

16. If in theory, we create a professional position with our contracted funds, we will need office space and quarters for this individual as a result of expanding our contract. How are funding for these two items handled within the context of expanded 638 contracts?

17. Please provide us with Chapter 14 of the IHS manual which deals with Mental Health policies and procedures, quality assurance, etc.

18. We request information on budget increases to the Area Mental Health Program in FY91 and FY92 which may include such items as Population Growth, Children's Mental Health, or other specifically labeled funding, and how each "pot" of funds was used by Area Mental Health in those two fiscal years.

This concludes our initial request for information on the program. We look forward to your response on these eighteen items.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

Bennie Cohoe, Executive Director

BC/RN:mc

xc: Dorothy Dupree, AD/OTA, AAO
Anthony Yepa, Project Officer/OPEI, AAO
Dr. Michael Beirnoff, Director/CMH, AAO
Diego Lujan, CO, AAO
Doreen Chino, Contract Specialist, AAO
Robert Newcombe, Health & Human Service Dir., RNSB
Ron Demaray, Admin. Services, Dir., RNSB
Rick Gatewood, Admin./PNHC, RNSB

ATTACHMENT 5

Core Data Set Requirements

(Comments on the publishing of the CDSR

in the Federal Register)

COMMENTS ON THE INDIAN HEALTH SERVICE
CORE DATA SET REQUIREMENTS

Ramah Navajo School Board, Inc.
November 05, 1990

The Ramah Navajo School Board, Inc., (RNSB) located in Pine Hill, New Mexico, has been contracting Indian Service programs since 1977 pursuant to Public Law 93-638. In its contracting history, the organization has experienced great difficulty in gaining access to its fair share of resources held by IHS for the purpose of operating RNSB health programs, and for its fair share of indirect costs needed to administer those programs. It is, primarily, for this reason that RNSB views the proposed Core Data Set Requirements with concern. While RNSB has no objection to publication of the CDSR and any changes in the Federal Register as it applies to the Indian Health Service, the organization would have stringent objections if the CDSR were made a requirement of tribal contractors in regulation. This objection is based on the resource issue, i.e., the connection between requirements which have the effect of law, for costly information systems and personnel to operate them, and the actual availability of resources to tribal contractors for operating and maintaining those systems to meet the requirements.

Federal government agencies that deal with Indians, including the Indian Health Service, have an unfortunate history of placing overly burdensome information requirements on tribal contractors, and have often threatened them with the termination of contract funds for refusing to submit reports. Tribal representatives involved in work groups with the Indian Health Service to draft implementing regulations for P.L. 100-472, the 1988 Amendments to the Indian Self-Determination Act, have put forward the position that program data and reporting in 638 contracts should be subject to negotiation on a contract by contract basis considering local conditions and circumstances. The tantamount consideration in local conditions and circumstances is the availability of funds

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to support the IHS "need" for information from the tribal contractor. An additional consideration would be the availability of technical assistance to set up and operate information systems. Too often in the past the requirement has been made without the concomitant resources.

The legislative history of P.L. 93-638 reinforces the premise that while information needs may be important and useful, there must be agreement between the Federal agency and the tribal contractor on the purposes of such reports. These information needs are to be NEGOTIATED with tribes and tribes may or may not consent to the reports. This is Congressional intent expressed in Senate Report 100-274.

The scope of the burden of these requirements is not clearly presented in the August 7, 1990, Federal Register Notice of the CDSR. The very term "core data set" is misleading in that broader information SYSTEMS are being discussed, each with its own manual or procedures defined in the Indian Health Manual, none of which are published in this Federal Register notice. What is of concern and objectionable here is that these systems are neither adequately or fully described. It should be noted that the IHS position in the current draft regulations to implement P.L. 93-638 (and P.L. 100-472) is that contractors will be required to maintain systems which will comply with reporting requirements of the CDSR. However, not only is the complete picture of the CDSR lacking in the Federal Register, but the Mental Health and Social Services Reporting System is not completely defined, Part 3, Chapter 12 of the IHS Manual for HERMS is under revision, the Generic Activities Reporting System is at the discretion of the Area Coordinator of the specific discipline program under consideration, and the ATGS is being phased out to be replaced by the Chemical Dependency Management Information System. Tribal contractors are being asked to swallow whole that which they can't even see to begin with.

The Ramah Navajo School Board, Inc., is aware that in the Albuquerque Area, repair and maintenance of the Registration Patient Management System (RPMS) hardware is a cost which the Service Units are being asked to subsume in their existing budgets. Given the Federal agencies' track record for supporting tribal contracting, what will be the fate of tribal contractors regarding the needed funding support for IHS information system requirements imposed by regulation? When it is necessary to add on or increase the capacity of a tribal contractors information system to meet the mandates of the requirements, where will the funding come from? It makes infinitely more sense from the contractors standpoint to make reporting requirements a matter of contract negotiation based on the Indian Health Service's ability at the Area level to deliver the necessary material and technical support.

If the CDSR is to be made a definite requirement in regulations for all contractors, then it should be accomplished in conformity with the requirements of P.L. 93-638 as amended by P.L. 100-472. The Act specifies that all Federal requirements for self-determination contracts and grants under the Act shall be promulgated as regulations in conformity with 552 and 553 of Title 5, United States Code, and that the Secretary shall consider and formulate appropriate regulations with the participation of Indian tribes. Such proposed regulations are to contain all Federal requirements applicable to self-determination contracts and grants. There has been a well established process with tribal participation for writing implementing regulations for P.L. 100-472 and P.L. 93-638 for the past two years. When the idea of publishing the CDSR in the Federal Register was brought to the joint Coordination Workgroup, composed of IHS, BIA, and tribal representatives, the tribal representatives asked for either a delay in going forward with the idea until which time the regulations were finalized (because the issue of data and reporting was being dealt with in the Coordinating

Workgroup process), or to make its consideration a part of a more extensive workgroup process, such as the Coordination Workgroup. The Ramah Navajo School Board, Inc., views the publication of the CDSR Notice in the Federal Register by the Indian Health Service as an act of bad faith, if not a violation of the law which calls for all regulations regarding self-determination contracts to be contained in one place.

To paraphrase Senate Report 100-274, proposed regulations which affect contracts under the Indian Self-Determination Act, should be relatively simple, straightforward, and free of unnecessary requirements or procedures. Congress expects the Secretary of Health and Human Services to work closely with tribes in the initial drafting of these regulations as well as in the subsequent refinement of proposed rules for publication. RNSB does not believe that the current back door approach of the Indian Health Service in its current CDSR Notice in the Federal Register meets this expectation.

NORTHWEST
PORTLAND
AREA
INDIAN
HEALTH
BOARD

November 1, 1990

Mr. Jack Markowitz
Indian Health Service
Rm. 5A-09, 5600 Fishers Lane
Rockville, Maryland 20657

Dear Mr. Markowitz:

The Northwest Portland Area Indian Health Board, which represents the thirty-nine federally recognized tribes in Oregon, Washington, and Idaho on health related issues, is pleased to have the opportunity to comment on the proposed Core Data Set Requirements published in the Federal Register on August 7, 1990.

I would like to begin by stressing that the Northwest tribes know the importance of timely and accurate information. The efforts of our Area's "Co-owned Information Task Force" are well known to the Indian Health Service and certainly are a testament to our commitment to the creation and maintenance of good information systems. The opposition we have to the adoption of the proposed Core Data Set is in no way an effort to be relieved of reporting information that is needed to improve health care and to efficiently manage federally-funded programs.

However, the proposed Core Data Set should never have been published separately from the regulations that are being developed to implement the amendments to P.L. 93-638. It was certainly our Area's understanding that any proposed information reporting requirements were to be included with the 638 regulations and not in a separate publication. The tribal involvement cited in the announcement did not support the publication of this separate publication. Someone in IHS spent a lot of time writing up every detail at every staff level of existing information systems, and to our knowledge there is no tribe in this country that has agreed to this.

This announcement does not describe core data elements. It describes the existing IHS computerized information systems. Several of these systems are used by IHS to meet its own administrative needs (ie. staff supervision) and are not appropriate for tribally run health programs. The NPAIHB's Co-owned Information Systems Task Force in its publication entitled Information to Improve Health Care for Indian People, 1988, cited specific criticisms of many of the proposed data systems and favored abandoning some of them. In that publication we mentioned that several of

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the proposed systems are not currently used by tribes because they are so poorly designed, because reports are not timely or helpful, and because tribes do not have direct access to the systems. These systems have not improved. We have not changed our opinion. So we certainly are not going to endorse these same systems now.

It is beyond our understanding why the Indian Health Service would want to tie its own hands by adopting this Core Data Set. Adoption would severely restrict the ability of the agency to modify data systems. But not only is it tieing its own hands it is trying to tie the hands of tribes as well, when it has never bothered to give tribes the opportunity to have input in the design or improvement of the systems. The adoption of this Core Data Set will eliminate improvements in these information systems because it will be too time consuming to change published regulations. The proposed core data set will do nothing to help tribes manage their programs, it will just institutionalize bad systems.

This publication demonstrates no appreciation on the part of IHS as to what it will cost to give tribes the ability to implement these systems. IHS does not come close to having the resources to pay for the equipment, training, and technical assistance that would be required. The proposed Core Data Set is not what is needed. What the NPAIHB has been saying for four years now is that what is needed is timely information that is "co-owned" by both the IHS and tribes. We need a partnership. The proposed data set creates a division.

The core data that the NPAIHB sees as essential is 1) health status data; 2) expenditure reports; 3) workload indicators (since the allocation of resources is being based on this); and 4) need (which is not measured in any of the proposed systems).

Tribes need systems which will provide a community oriented approach, not a medical discipline approach. These systems will reflect the epidemiology of the IHS system alone and will not include information from other health care providers in the community. Tribal governments need to know what things are killing the people in their communities--what things are damaging. They need to be able to focus their limited resources on the right things and to know when programs aren't working. They need information systems that will assist in effecting the needed changes to improve health status for their community members. The proposed core data systems will not provide this information.

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The Northwest Portland Area Indian Health Board vigorously opposes the adoption by IHS of the proposed Core Data Set Requirements, and even more vigorously opposes the imposition of these information systems on tribes who contract under P.L. 93-638 for health programs. Instead we support efforts by IHS to work with tribes to develop information systems which will provide tribes with the community specific data they need to improve the health status of their members.

Sincerely,

Doni Wilder

Doni Wilder
Executive Director

cc: Board Delegates
Dr. Batliner
Co-owned Task Force

3

ATTACHMENT 6

(Comments to the BIA Area Director and Assistant Secretary on proposed Financial Assistance and Social Services Programs regulations)

SS rego.

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September 20, 1991

Honorable Area Director
Albuquerque Area Office
Bureau of Indian Affairs
U.S. Dept. of the Interior
P.O. Box 26567
Albuquerque, NM 87125-6567

Re: Draft regulatory revisions to financial assistance and social service regulations (25 C.F.R. pt. 20) (Our File No. 2403.33)

Dear Area Director:

Pursuant to your memorandum of August 7, 1991 we are mailing today comments prepared on behalf of the Ramah Navajo School Board (RNSB) regarding draft new social services regulations currently being considered by the Department.

A. INTRODUCTION

The Ramah Navajo School Board (hereafter the Tribe) has for several years operated Bureau financial assistance and social services programs pursuant to the Indian Self-Determination Act, 25 U.S.C. 450 et seq., on behalf of the tribal members resident in the Ramah Navajo Community. The Tribe has thus developed considerable experience in administering these programs, particularly the general assistance program and the child welfare program. The Tribe has also developed considerable first hand knowledge regarding the strengths and weaknesses of these programs.

The Tribe strongly opposes the proposed new regulations, and urges that they be immediately withdrawn. Overall, the proposed new regulations would not only maintain

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serious deficiencies in the existing regulations, but would unnecessarily complicate the administration of these programs. The net affect would substantially increase the administrative costs of operating these programs while denying benefits to eligible Indian people.

The draft preamble to the proposed regulations fails to set forth any meaningful information which might justify the Department's new initiative. In fact, the *only* justifications offered are vague references to "past experiences" and "various audits." Before undertaking a major overhaul of regulations governing such a critical series of programs, the Department has a legal duty to disclose fully its rationale for each and every change. Absent such justification, the Tribe views the new regulatory proposal as a capricious action which fails to satisfy the minimum requirements of the Administrative Procedure Act and the law developed thereunder.

Despite the fact that a majority of the programs affected by the regulation are currently operated by Indian tribes under the authority of the Indian Self-Determination Act, the Department has, to date, allowed only meager tribal participation in preparing the proposed revisions. The three so-called "hearings" held by the Department were scheduled on only 15 working days notice in the *Federal Register*, and few tribal representatives attended. The relatively minor number of changes made by the so-called tribal "task group" confirms the lack of meaningful tribal participation by representatives familiar with tribal administration of general assistance and child welfare assistance programs.

The Tribe strongly urges the Department to suspend this regulatory initiative. In the meantime, the Department should (1) commission a report by an expert panel, including tribal representatives, to comprehensively review past administration of these programs, to review developments over the past 15 years in the social services disciplines and in tribal human services systems, and to begin to craft a new and more responsive means of efficiently administering programs which will effectively help needy Indian people and children; and (2) pull together a national task force of tribal representatives from all Areas of the country, to provide the necessary framework and perspective to guide the development of regulatory improvements.

B. BRIEF OVERVIEW

The Tribe strongly takes issue with the concept of "residual source" and "payor of last resort" reflected in the existing regulations and strengthened in the proposed revisions. The United States has a sacred trust responsibility to Indian people founded in treaties, statutes and the U.S. Constitution, a trust responsibility to Indian people which cannot and must not be evaded nor displaced by reliance on state governmental agencies -- entities which have

been frequently characterized as the Indians' "deadliest enemies". The Tribe's concern is based not only upon this important legal proposition but on very real practicalities.

Tribal communities situated in extremely remote areas are ill-equipped and poorly positioned to assure that all resources which may be available from a state agency hundreds of miles away have been sought. Moreover, unlike tribal programs developed within the parameters of Part 20, state programs are not developed with remote Indian reservation communities primarily in mind — if indeed these communities are considered at all. This fact underscores both the fallacy in positioning the Department as a payor of last resort, and the fallacy of tying general assistance and child welfare assistance payment amounts to state payment amounts. For the Tribe, this practical limitation is most vividly seen in the child welfare assistance area where placement of a child in a non-medical facility, based on state standards, would limit the tribe to a per diem rate of $8.63, as compared to actual and reasonable local daily costs for such a facility of $55 to $75.57.

As with the "residual policy", the Tribe calls upon the Bureau to do away with the concept of limiting tribal assistance payments under Part 20 to state standards of payments, and specifically objects to further implementation of that policy in the draft revisions. The Department must recognize that the needs of Indian communities are unique and are not reflected in state standards largely developed to address the needs of poor urban populations. Particularly in the area of child welfare assistance, where federal and tribal jurisdiction is so clearly delineated under the Indian Child Welfare Act, 25 U.S.C. 1901 et seq., it is inappropriate to cap federal or tribal payments at state levels.

The Tribe objects to the suggestion in the revisions that the new program standards will be applied equally to Bureau-operated programs and to tribally-operated programs administered under the Indian Self-Determination Act. The application of program standards to tribally-operated "638" programs is a matter which can only be addressed within the framework of the regulations being prepared to implement the 1988 (and other) amendments to the Indian Self-Determination Act. The Part 20 regulations should state clearly that they do not apply to social service and financial assistance programs operated by tribes, and should refer the reader to the appropriate Part which addresses implementation of the Indian Self-Determination Act for guidance on program standards applicable to "638" contractors.[1] In this regard, the Tribe notes that, in explaining the 1988 Indian Self-Determination Act Amendments, Senate Report No. 100-274 emphasized that a key congressional policy is that regulations governing contracted programs are to be simplified, free of unnecessary

[1] The regulations should state clearly at the outset (section 20.2) that they do not apply to tribally operated programs administered under the Indian Self-Determination Act, although they may serve as a guide to tribes in developing their own standards and procedures to carry out such programs.

requirements or procedures, and free of reporting requirements and standards which either increase administrative costs of operating programs (at the expense of direct services) or deprive tribes of the program flexibility needed to carry forward the policy of self-determination.

In the event the Department seeks to impose the revised program standards on tribally-operated programs, the Tribe takes strong issue with the substantially increased paperwork and casework requirements imposed by the regulations. The level of funding provided to tribes is simply insufficient to hire staff with the professional skills necessary to meet the proposed new requirements. Moreover, even if the Tribe were fortunate enough to locate such staff, it could never hire and retain that staff without substantially increasing its administrative costs at the corresponding expense of direct program dollars. The regulations must be realistic and practical given the setting in which these programs are administered, and the preeminent goal should be to provide assistance to needy clients with a minimum of bureaucracy and operational costs. Unfortunately, the new regulations go precisely in the opposite direction.[1]

With the foregoing general observations in mind, the Tribe disagrees with the Department's conclusion that the new initiative does not represent a major rule which will have significant economic impact. To the contrary, it is abundantly clear that the substantial new requirements which would be imposed by these regulations will lead to a substantial reduction in the number of Indian people served while increasing the Department's costs for administering these programs. The Tribe estimates that its administrative costs would *triple* in the event the new regulations were applied to "638" contractors. In short, if these regulations are adopted, substantially increased funding will be necessary or available benefits will be reduced. Either way, it is clear the proposed new regulations represent a "major rule" which will have significant economic impacts.

C. SELECTED SECTION-BY-SECTION COMMENTS

The Tribe sets forth below brief comments on major problem areas in the draft regulation. It is not the Tribe's intent, however, to provide an exhaustive discussion of each and every sub-section, and by not discussing a subsection the Department should not take the

[1] The clearest example of the increased operational requirements is reflected in the sections relating to child welfare assistance, which call for substantially increased procedures and documentation in the areas of case planning, resource evaluation, annual foster evaluations, and so forth. It is simply impossible to impose such requirements given existing funding levels. While it may be ideal to develop a case plan with short term goals and long term goals for every recipient of financial aid or other services, as a practical matter this is simply not possible in most reservation communities.

Tribe's silence as agreement. Further, the Tribe does not repeat below its objection to frequent statements that the programs are residual to state programs, nor to the numerous references to state standards of payment. As noted earlier, the Tribe believes that the regulations should do away with these concepts, and that payment levels should be capped at reasonable levels given local market conditions.

Section 20.1 "Case Plan". While development of case plans is the ideal in social work, it is simply not realistic to expect that the limited funds and limited resources available to carry out these programs in Indian country will permit the employment of individuals capable of developing case plans along the lines being suggested. This definition, and references to case plans elsewhere in the regulations (i.e., section 20.10(c)(1)), should be deleted.

Section 20.1 "Child Welfare Assistance". At the expense of repetition, this is but one example of the regulation's objectionable reference to state standards of payment. State standards of payment to non-medical care facilities are often based on payments to organizations (such as Catholic agencies) which have highly subsidized per diem rates. Typically comparable facilities are simply unavailable on reservations, and they are certainly not available in the Ramah Community. This subsection should instead require that payments be "in accordance with the reasonable costs of care in light of local conditions."

Section 20.1 "Essential Needs". This definition should include a reference to "special" items, as contained in the current regulation.

Section 20.1 "Indian". The Tribe notes that unless the word "and" is changed to "or", this definition represents a dramatic shift in eligibility requirements. As with most other provisions in the regulations, no explanation is provided to support a change in the existing criteria for a person to qualify as an "Indian".

Section 20.1 "Indian Court" and "In-Home Provider". The Tribe supports the alternative definitions set forth in large type.

Section 20.1 "Liquid Assets". The Tribe objects to the new reference to "royalty payments", which involve unknown future contingencies. In addition, the Tribe recommends a proviso be added that would exempt from the definition assets whose conversion to cash would involve loss of interest or penalties.

Section 20.1 "Miscellaneous Assistance". The Tribe strongly objects to the proposal to restrict such assistance to burial and natural disaster needs only, as opposed to the current more flexible definition. The current definition (section 20.10(f)) should remain unchanged.

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Section 20.1 "Near Reservation". This provision should be modified to delegate the Assistant Secretary's authority to the local BIA Superintendent.

Section 20.1 "Out of Home Care Provider". The Tribe objects to the mandatory requirement that such providers be licensed. Such a requirement is simply not feasible in Indian country, particularly in emergency child protection situations. Similarly the requirement regarding "treatment planning" is unrealistic in most Indian country situations. Finally, this definition should clarify whether subsections (1) – (3) apply only to "a specialized residential program" or (less likely) to other types of providers.

Section 20.1 "Permanency Planning". The Tribe believes that permanency planning represents a continuing and ongoing process, and objects to the suggestion that permanency planning occur during a single brief window of opportunity.

Section 20.1 "Residency". The Tribe objects to the proposed new 30 day requirement.

Section 20.1 "Specialized Residential Programs". The words "state or tribally" should be inserted prior to the word "licensed".

Section 20.1 "Policy". The proposed regulation and the policy statement cannot be reconciled. Simply put, the proposed regulations do not represent a genuine or meaningful effort to provide social service programs that will meet the needs of Indian people in Indian country. The effect, if not the intent, of the regulations, particularly as they would be amended, is to carry out the non-Indian model of social services and at funding levels that are woefully inadequate to meet existing need.

Section 20.10(b). This is one of many provisions that appears to apply only to Bureau-operated programs and not to programs operated by tribes under the Self-Determination Act. As indicated earlier, the Tribe opposes the implication that the remaining provisions *do* apply to tribally-operated programs. Again, Section 20.2 should clarify that the regulation does *not* apply to tribally operated programs, although it may be looked to as a guide by tribes in administering such programs.

Section 20.10(c). The Tribe objects to the mandatory use of OMB forms, particularly in tribally-contracted programs, and in subsection (1) objects to the requirement for maintaining elaborate case plans. In subsection (2), case notes, rather than a full narrative, should be sufficient.

Section 20.11(c). The case plan requirements, again, are unrealistic. This subsection should be deleted in its entirety. In the alternative, case workers should merely be encouraged to develop case plans to the extent feasible within available resources.

Section 20.12(b). The Tribe objects to reducing the advance notification period from 20 days to 10 days. The Tribe also suggests that advance notification not be mandatory in the case of financial assistance increases. Likewise, the Tribe objects to the shortening of the time period for notification prior to suspension or termination of benefits in subsection (2).

Section 20.13. The Tribe objects to the mailing requirement for decisions to approve benefits, given the costs of the proposed "certified mail return receipt" requirement.. The sole purpose of the notice is to advise the applicant of appeal rights and applicable time frames, matters which are irrelevant in the case of a decision approving benefits.

Section 20.14. Subsection (a) fails to specify what "other necessary documents" might be required to stop payment on a check. There should be no requirement for a client to complete documents before the issuer authorizes a financial institution to stop payment. In subsection (b) the Tribe objects to any limitation on the legal obligation to pay benefits not paid due to administrative errors, irrespective of the fiscal year in which the administrative error occurred. In subsection (e) it would appear unnecessary to establish an opportunity for a voluntary resolution where an adjustment involves underpayments rather than overpayments.

Sections 20.15 and 20.16. In the event these regulations are revised to apply to tribal contractors, the Tribe strenuously objects to the excessive reporting requirements imposed under this section. Such reporting requirements are inconsistent with the Tribe's "mature contractor" status under the Indian Self-Determination Act, and are otherwise inconsistent with the intent of that Act's 1988 amendments. Likewise, the Tribe strongly objects to any mandatory imposition upon tribes of prescribed staffing patterns and to any involvement by an Area Director in a tribe's determination of appropriate staffing patterns.

Section 20.21. The level of coordination with other programs anticipated in subsection (a) is not realistic and, in the past, has generally not occurred. In subsection (e) the Tribe strongly objects to increasing redeterminations to every 3 months from every 6 months for unemployable recipients of general assistance. There is no justification for this substantial increase in workload. Similarly, the Tribe objects to inclusion of the word "personal" in subsection (e)(2). In subsection (g)(1)(ii), the Tribe questions the exclusion of "business expenses for depreciation and for purchase of capital equipment and payments on the principal of loans for capital assets or durable goods".

Among the most unrealistic aspects of the regulation is subsection (j), requiring "an employability plan with specified timeframes that will lead to gainful employment." In reality, the severe socio-economic conditions which face most reservation communities make such a plan virtually impossible. Nonetheless, at considerable expense the new regulations would mandate the development of precisely such plans.

Subsection (j)(1)(vi) unwisely exempts a parent caring for children only up to the age of 6, a restriction which may well lead to increased levels of child neglect due to forced employment. Finally, subsection (j)(2)(iiii) [sic] should be revised to eliminate multiple layers of bureaucracy involved in determinations on the acceptability of proposed programs or training.

Section 20.21. The proposed revision represents perhaps the worst example of making regulatory changes where none is needed. But for the limitation to state payment levels, the current regulatory regime works well, yet the proposal would virtually triple the length and corresponding complexity of the system. The Tribe objects to the provision in subsection (c) requiring active exploration of a myriad of other funding sources as a condition to receipt of child welfare funds. History has shown that the Bureau has been totally unable to coordinate the delivery of services from these different funding sources. Indeed, in the case of the Tribe, the Bureau has actually denied approval for grants that would have facilitated this very coordination. The Tribe therefore strongly objects to proposed new subsection (c).

Once again the Tribe objects (here, in subsection (d)) to the setting of payments according to state-established payment rates. Subsection (e) will not work in the field, where frequently no licensed out-of-home providers are available. To cite an example from the Tribe's experience, one day the court ordered that 18 children be placed. Confronted with a daunting situation, the Tribe within 24 hours drew upon child welfare assistance funds to establish, stock and staff a local shelter. Child welfare payments were capped at the rate of $55.00 per day. This is but another example of the inability of the draft regulations to accommodate what is actually happening in Indian country.

Subsection (f) repeats the unrealistic expectation of a "case plan" prior to approval of each in-home care provider. Subsection (g) should not be limited to out-of-home placements, since similar purchases may be equally necessary and essential to secure or stabilize an in-home placement. Finally, the Tribe objects to the burdensome approval process for adoptive subsidies, matters which should not be handled differently than ordinary foster care assistance. The Tribe also objects to different approval processes depending upon the Indian status of the adoptive parents, since the focus should always be on the Indian child

Section 20.23. As noted earlier, the proposed revision would effect a substantial restriction in the types of needs which may be addressed by the miscellaneous assistance program; no justification has been offered for such a restriction. Even within the three restricted categories, the regulation is considerably more limited than current program standards. For instance, subsection (1)(a) limits disaster assistance to "one time" assistance irrespective of the particular circumstances. The Tribe recommends adoption of the bold type version of subsection (1)(a). On the other hand, "special personal needs" (subsection (2)) are left entirely undefined. Given the reference to "mental or physical" reasons for a special needs allowance, the limitation to a "one-time" allowance is especially peculiar.

Burial assistance is improperly limited in subsection (3)(d)(1) to a 90-day rule which ignores circumstances that might have led to a longer absence from the reservation, such as hospitalization or long-term care outside the service area. The Tribe also objects to imposition of state-established or Secretarially-established burial rates in lieu of tribally-established rates based upon local conditions. Finally, in subsection (g) the term "culturally relevant tribal burial practice" is not defined.

Section 20.24. The proposed revision represents a wholesale reorganization and expansion of the current regulations governing family and community services. The reason for reorganizing and expanding this section is not set forth in the preamble and is certainly not apparent from the section itself. Indeed, the numbering system is so confused that this section is virtually impenetrable.

The provisions on pages 51 through 54 (which all appear to be part of section 20.24(a)(4)) are of particular concern to the Tribe due to the extent of case worker documentation requirements (including medical examination requirements in non-child protection cases), mandatory minimum monthly visits regardless of particular circumstances, mandatory monthly written reports (again, notwithstanding particular circumstances), annual written evaluations for licensed foster families (even where, as with the Tribe, families are licensed for two years upon completion of an exhaustive evaluation process), mandatory and immediate reunification services (notwithstanding the absence of one or both parents), inappropriate imposition of standards applicable to tribal court proceedings (subsections (f) and (h) (p. 53)), and inappropriate assignment to case workers of functions which may already be performed by tribal licensing authorities (subsection (i)).

The regulations reach the extreme in the provisions regarding a 60 day case plan set forth in subsection (a)(4)(iii). While case plans such as this may be possible in some instances, it is simply not feasible in most situations and it is certainly not within the ability of Tribes as presumed to satisfy all these requirements. The Tribe posits that the only effect of such inflexible requirements will be to establish a [illegible] and valid exception

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when monitoring tribally- administered programs, without any corresponding benefit for the Indian children and families given the limited available resources. In short, most of the provisions set forth in 20.24 are absolutely unacceptable.

Section 20.26. Subsection (a)(1)(i) should be revised to accommodate requests from case workers and medical providers. Subsection (iii) of the same section should be deleted; again, documenting that all other sources have been explored is both unrealistic and harmful to the recipient who must await completion of all these tasks before receiving institutional care.

The Tribe also objects to subsection (a)(1)(vii), forbidding any adult care payment before all client eligibility factors and need have been determined and the client has been certified eligible. Such a provision will prohibit placement of an adult who may be in immediate extreme hardship. The Tribe also objects to subparagraph (3)(i), and to imposing upon recipients the duty to immediately inform the Bureau of changes in status; physically and mentally limited clients, including elderly clients, can hardly be expected to provide such notification, and their failure to do so should not operate to their prejudice.

Section 20.27. This major shift in the current regulatory regime will mandate implementation of the work experience program (WEP) for all employable recipients. With WEP tied to general assistance, and general assistance tied to unrealistically-low state established rates, the funds available to cover the required work could well be less than the prevailing minimum wage. Such a radical change from the current regime should not be institutionalized in the absence of a very broad dialogue with all Native American tribes. As with similar provisions elsewhere in the regulations, the requirements for a "case work plan" and an "employability plan" will simply add to the administrative costs of operating these programs. Moreover, under subsection (d), grant assistance funds will not be available to administer the work experience program. The source of funding for this program remains unaddressed. To suggest that tribal funds should be tapped to support this new federal initiative (subsection (g)) is absolutely unacceptable.

Subpart 20.23. The draft revision leaves largely untouched the provisions set forth in existing regulation. The Tribe does object, however, to new bold language which would require a tribal contractor to follow the same appeal process established in connection with Bureau eligibility determinations. The appeal process established by tribes will be governed by the tribal constitution, tribal law and custom, the due process clause of the Indian Civil Rights Act, and the policy established by the tribal government within the tribe's available resources. The Tribe strenuously objects to any suggestion that the Bureau may dictate tribal appellate procedures.

Section 20.35. The Tribe's objections to Subpart E. stem from its concerns regarding the massive increases in documentation and case work required in the earlier subparts. Taken together, the effect, if not the intent, is to establish tremendously burdensome requirements on tribal contractors, requirements which will never be met by Bureau-administered programs and which cannot possibly be met by most tribally-administered programs. Through monitoring functions the Bureau will then document a substantial non-compliance rate and use those findings to justify terminating these programs in their entirety. While this scenario may well not be intended by the drafters of the new proposed regulations, there can be little doubt that precisely this scenario will unfold following their promulgation.

CONCLUSION

The Ramah Navajo School Board is alarmed at the directions being taken in the proposed draft regulation. While the Tribe is critical both of the Department's failure to provide for adequate tribal consultation and its failure to undertake a meaningful, in-depth and expert comprehensive analysis of the social service problems facing Indian people, the Tribe is grateful to have this opportunity to comment before the regulatory process goes any further. It is the Tribe's hope that, upon further consideration of these and other comments, the Department will suspend the current regulatory initiative to revise 25 C.F.R. part 20.

We appreciate the opportunity to submit these comments on behalf of the Ramah Navajo School Board.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON

Lloyd Benton Miller

LBM/ms
cc: Robert Newcombe
Health & Social Services Director (via telefax)

[illegible]

RAMAH NAVAJO SCHOOL BOARD, INC.

TELEPHONE
(505) 775-3256

P.O. DRAWER A
PINE HILL, NEW MEXICO 87357

May 31, 1991

Dr. Eddie Brown, Assistant Secretary
U.S. Department of Interior
Interior Building
18th & C Street, NW
Washington, DC 20240

Dear Dr. Brown:

The Ramah Navajo School Board, Inc., (RNSB) located in Pine Hill, New Mexico, has been contracting its Social Services Program from the Bureau of Indian Affairs (BIA) since 1978 under Public Law 93-638, the Indian Self-Determination Act. We write to request that you withdraw proposed social services and financial assistance regulations which are being prepared for publication as a Notice of Proposed Rulemaking (NPRM). The draft regulations were approved by an Acting Assistant Secretary on March 13, 1991.

We are concerned that the draft regulations approved on March 13 bear little resemblance to those provided at the public meeting we attended on November 6, 1990, in Phoenix. At that time RNSB went on record objecting to the limited field "consultation" hearings (3) conducted after limited notice in the Federal Register (15 working days only prior to the meetings). RNSB further objected that the Bureau had formulated draft regulations for Social Services Programs without meaningful tribal participation in the formulation of that draft. The explanation for revising the regulations as published in the October 19, 1990 Federal Register was woefully inadequate. RNSB found that the proposed draft regulations for the Indian Self-Determination Act as amended by P.L. 100-472 were in conflict with the Bureau's proposed draft regulations for Social Services Programs. We found resource issues related to fulfilling requirements of the draft regulations which went unaddressed. We found questionable reporting requirements. RNSB called for the Bureau to establish a work group open to tribal representatives from each Area to convene and review the draft regulations with a view to rewriting the draft with meaningful tribal input (not limited public hearings). As over 70% of BIA Social Services Programs are tribally contracted, that product should then be reviewed by the Coordination Workgroup for P.L. 93-638 regulations (already established by the Bureau and tribes) for consistency in meeting the mandates of Indian Self Determination.

RNSB is disappointed that the Bureau has not provided tribes and tribal organizations with copies of the March 13 draft for review and comment. We understand there are new developments in the draft which do not reflect tribal participation and input. Among these are the following:

1. The revisions to the draft purport to reduce the noncompliance rate of eligibility for General Assistance (30%) which is, apparently, the BIA's only rationale for promulgating new regulations. We question the validity of the Bureau's assertion that 30% of individuals receiving General Assistance (GA) are not eligible. RNSB participated in the 1988

quality control review and believes the sample of cases reviewed to be less than scientific and the criteria used in the review to determine eligibility faulty. Absence of the reviewers criteria in a clients file (Certificate of Indian Blood or evidence of residence) do not necessarily indicate noneligibility.

2. Concomitant with the proposed regulations on GA is the BIA's proposed reduction of $12 million and 12,000 GA cases in Fiscal Year 1992. At no time has the BIA discussed this with RNSB or any tribe or tribal organization that we know of. We are concerned for the adverse impacts this will have on the Ramah Navajo Community, particularly the elderly. We understand the proposed regulations would require all "employable" GA recipients to participate in "employability plans" without regard to age. There are no provisions for supportive services such as employment counseling, training, substance abuse treatment, transportation or child care, all of which are needed in the Ramah Navajo Community to assist people to obtain job skills and gainful employment. Additionally, the BIA has apparently failed to coordinate the development of"employability" requirements with Job Training Partnership Act programs and with the Department of Labor. The BIA FY 1992 requests for an increase in Employment Assistance funds will provide a national increase of only 262 training slots. Clearly, these increased slots will not offset a decrease of 12,000 GA cases.

3. Time frames have been reduced which will have impacts on both clients and program administration: the current requirement to give GA clients 20 days written notice prior to termination or decrease in benefits would be reduced to 10 days; the current requirement to redetermine benefits every six months for nonemployable recipients would be reduced to quarterly redetermination.

4. The proposed regulations would require tribally operated Social Services Programs to obtain approval from the Office of Management and Budget (OMB) for the use of tribal forms. This would be a major new development in BIA policy for self determination. Issues of this nature need more intensive and meaningful tribal input and should be considered in the established forum (Coordination Workgroup) for P.L. 93-638 regulations and contracting matters. How would this even work? It requires further consultation.

5. The proposed regulations would require tribally operated Social Services Programs to report "unit costs" for program expenditures, but "unit costs" are not defined. In that Congress expressed an intent in the legislative history of P.L. 93-638 and 100-472 that the Federal agencies negotiate reporting requirements with contractors, the Bureau's draft regulations for Social Services Programs and its reporting requirements may represent a departure from Federal self determination policy and intent.

As a result of these and other problems with the proposed regulations, we are requesting that you withdraw and abandon the March 13 regulations. As an alternative, we recommend that you establish a process, in cooperation with tribes and tribal organizations, to develop social services policies that reflect the developments over the past twenty years of tribal human services systems and in social services as a discipline. The following are objectives which we believe such a process should accomplish:

1. Conduct an inventory of existing social services programs on Indian lands. (For example, you may not be aware that over 70% of BIA social services programs are contracted by tribes.)

2. Identify successful and innovative tribal approaches to services for the elderly, child welfare services, substance abuse services and employment training programs.

3. Identify and describe case management and resource coordination systems used by tribes.

4. Identify the Tribe/Agency social services funding levels that would be needed to restore resources lost because of inflation, reservation population growth and BIA expropriation of Tribe/Agency dollars.

5. Identify tribal needs for professional level staffing, resource development, technical assistance, supervisor training and casework training.

6. Develop a mission statement for tribal/BIA social services that reflects:

   - Tribal Self-Determination Act contracting.
   - Comprehensive and coordinated human services systems.
   - The role of human services in tribal economic development.
   - The diversity of human services needs for 300 tribes and 200 Alaska Native villages.

7. Develop a BIA social services budget request for the FY 1993 budget that reflects:

   - Restoration of base Tribe/Agency funding to at least the 1981 inflation plus population growth level.
   - Funding for comprehensive services including child welfare systems, services for the elderly, substance abuse services and employment and graduate levels.
   - Funding for professional training of social workers at the undergraduate and graduate levels.
   - Training and technical assistance in the areas of case management, casework services, in-home support services and progrm management.

This cooperative Tribal/BIA social services policy development process would be consistent with your stated commitments to support Indian Self Determination.

We look forward to receiving your response to this letter in the next thirty days so that we can begin working with the BIA on the policy development process described above, and so that the results can be incorported into the FY 1993 proposed BIA budget.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

Ronald B. Damon

For Bonnie Cohoe
Executive Director

cc: Martha Garcia, President, Ramah Navajo Chapter
Nelson Thompson, Delegate, Navajo Nation Council
Robert Newcombe, Health & Human Services Director, RNSB
Larry Winn, Acting Social Services Director, RNSB
Senate Select Committee Members
New Mexico Congressional Delegation Members
Honorable Sidney Yates, Chairman, House Subcommittee on Interior Appropriations
Senator Robert Byrd, Chairman, Senate Subcommittee on Interior & Related Agencies

ATTACHMENT 7

(Letters and comments on Housing Improvement Regulations and BIA administrative initiatives for HIP)

RAMAH NAVAJO SCHOOL BOARD, INC.

TELEPHONE:
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FAX 775-3240

P.O. DRAWER 10
PINE HILL, NEW MEXICO 87357

July 31, 1992

The Honorable Daniel K. Inouye, Chairman
Select Committee on Indian Affairs
United State Senate
838 Senate Hart Office Building
Washington, DC 20510

Dear Senator Inouye:

As the Chairman of the Senate [illegible] Committee on Indian Affairs, this letter is to forward [illegible] comments we have recently sent to the Bureau of Indian Affairs on [illegible] called Initiatives for Improving the Administration of the Housing Improvement Program Bureau-wide. We send this package for your information as we believe it is just one example of the Federal agencies' refusal to fully embrace the Indian Self-Determination and Education Assistance Act, particularly the 1988 amendments of 1988, and represents continuing agency efforts that subvert the intent of Congress embodied in the Act, its amendments, and its legislative history.

Again, we state for the record our support of the immediate introduction and passage of the Administration's newly proposed amendments forwarded to the Senate Select Committee on Indian Affairs earlier this year. Left without further legislative clarification on technical points related to the overall spirit and intent of the Act, the Federal agencies will continue to perpetuate the Federal domination of tribal self-determination contracting and a bloated Federal contract monitoring bureaucracy.

Thank you for your attention to these matters on behalf of tribes and tribal organizations nationally.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

Robert Nez (for)

Bennie Cohoe, Executive Director

BC/RN/mc

cc: Martha Garcia, President, Ramah Navajo Chapter
Board Members (5)
Lloyd Miller, Attorney, Sonosky et al

ENCLOSURE

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RAMAH NAVAJO SCHOOL BOARD, INC.

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P.O. DRAWER 10
PINE HILL, NEW MEXICO 87357

July 30, 1992

Dan Morgan, Chief
Division of Housing Services, BIA
Department of the Interior, Room 4640
1849 C Street, NW
Washington, DC 20240

Dear Mr. Morgan:

Reference is made to a memorandum dated July 7, 1992, from the Deputy Commissioner of Indian Affairs to all Area Directors and Housing Officers regarding initiatives for Improving the Administration of the Housing Improvement Program (HIP) Bureau Wide.' This memo was forwarded to us by our Agency Superintendent and received here on July 24, 1992, only 24 hours before the Assistant Area Director was call[illegible] for comments on it. The Health & Human Services Director for [illegible] organization, Robert Newcomb, spoke to Ron Thurman of your office on July 24, 1992, and stated that we would organize our comments on these Central Office proposed initiatives for HIP and deliver them to your office this week. Mr. Thurman welcomed the [illegible] hear and present you with our thoughts.

It must be stated up front, and quite frankly, that we believe the Bureau has gone off the deep end with these proposed initiatives to the extent the Bureau intends to impose additional policy requirements on tribal contractors. The Final Rule on 25 CFR 256 for the HIP which the Bureau, without tribal consultation, rushed to publication in the Federal Register, effective February 26, 1992, is already a violation of the spirit and intent of the Indian Self-Determination and Education Assistance Act as amended (see our Comments faxed to Ron Thurman on November 13, 1990, copy attached). This publication of regulations which effects tribes and tribal organizations contracting pursuant to P.L. 93-638 is completely out of sync with what has been labeled a joint Tribal/Federal Agency consultation effort to draft a comprehensive set of self-contained 638 regulations as mandated by the Act as amended (a process that is still ongoing after four years). The right hand of the Bureau does not appear to know what the left hand is doing.

It is quite clear from the legislative history of the Indian Self-Determination and Education Assistance Act Amendments of 1988, as reflected in Senate Report 100-274, which expresses Congressional intent, that Federal agencies are to cease the practice of imposing

agency policies and compliance requirements on tribal contractors. This intent was flaunted by the Bureau in publishing the revised HIP regulations which places the HIP Model Contract, a generic Bureau policy, into regulation. There now appears to be a further assault on this intent as reflected by the proposed imposition of additional generic Bureau policies and compliance requirements on tribal contractors. I quote to you from Senate Report 100-274 certain pertinent sections which deal directly with Congressional intent in this matter:

> "The intent of this amendment is to prevent Federal agencies from imposing unnecessary contract compliance and reporting requirements on tribal contractors through the use of administrative policy directives... which have been used in the past to impose new conditions on tribal contractors.
> Similarly, the Committee intends for the amendment to prevent the Bureau of Indian Affairs from requiring tribal contractors to adhere to standards or procedures contained in the Bureau of Indian Affairs Manual (BIAM). The Committee amendment also prevents the Bureau of Indian Affairs from requiring tribal contractors to utilize financial, procurement, travel and personnel systems or procedures utilized by the Federal Government for the internal operation of Federal agencies. This amendment is further intended to prevent other agencies within the respective Departments...from imposing new conditions on tribal contractors such as a requirement to conduct additional audits in excess of those required by the Self-Determination Act and the regulations promulgated thereunder.
> It should be clear from the intent of the Indian Self-Determination Act that the administrative procedures and methods used by Federal agencies for their own internal operations should not be imposed on tribal contractors." p.20

> "These amendments are consistent with the philosophy that the Federal government should not intervene in the affairs of State, local, or tribal governments except in instances where civil rights have been violated, or gross negligence or mismanagement of federal funds is indicated, as provided in Section 109 of the Act... The Committee recognizes that there may be legitimate needs for information for statistical, research or evaluation purposes, and that these needs may be negotiated with tribes. Tribes may or may not consent to reports for such purposes... Tribal compliance or noncompliance with such reporting requirements is not to be used by the

> Federal agencies as the basis for withholding or terminating contract funds." p.21
>
> "This section is also intended to emphasize the need for the Federal government to consider tribal needs on a tribe-by-tribe basis, and to move beyond the tendency to develop "generic" policies applicable to all tribes regardless of needs or conditions. A corollary of this statement is that new tribal policy proposals, if they are to be effective, will have to come from the tribes themselves." p.16
>
> "The elimination of otherwise applicable federal procurement law and acquisition regulations, combined with authorization by the Committee amendment of so-called "mature contracts" is intended to decrease the volume of contract compliance and reporting requirements associated with tribal contracts, and to decrease the volume of necessary contract monitoring requirements on the Federal agencies. The Committee therefore expects that the federal contract monitoring bureaucracy that has replaced the federal service bureaucracy will be greatly reduced over the next three years." p.19

Put simply, the Bureau was wrong to publish the revised HIP regulations and they are wrong in proceeding with the proposed HIP Improvement Initiatives which impose any additional requirements on tribal contractors. While the Bureau may be "between a rock and a hard place" with the Office of Inspector General and with internal Bureau reviews using A-123, when it comes to tribal contractors the overriding factor is the Indian Self-Determination Act as amended.

Pursuant to the Single Audit Act and provisions of P.L. 93-638 as amended, this organization undergoes annual independent audits (inclusive of HIP) by a Certified Public Accountant using OBM Circular A-128 guidelines. There have never been significant questionned costs under our HIP program. While the Bureau is welcome to one annual contract monitoring visit at Pine Hill to check compliance with the provisions of our contract, the Bureau has no business conducting A-123 reviews of any tribal contractor. Therefore, while the Bureau is free to undertake initiatives to improve the administration of Bureau-run HIP programs, initiatives to improve any individual tribal program cannot be undertaken without tribal consultation and tribal consent. Unless the Bureau has reason to believe there have been civil rights violated, gross negligence, or mismanagement of federal funds in individual tribal contracts pursuant to Section 109 of the Act, the Bureau should stay home. This is what is meant by the intent to decrease the volume of contract compliance associated with tribal contracts and contract monitoring requirements of the Federal agencies. This is what is

meant by moving beyond the tendency to develop "generic" policies applicable to all tribes regardless of needs or conditions. This is what is meant by an orderly transition from the Federal domination of programs to meaningful participation by Indian people in the planning, conduct, and administration of those programs and services.

Specifically, to address the objectionable parts of the Deputy Commissioner's July 7 memo, we make the following comments:

PROGRAM ELIGIBILITY

1. Ensure that applicants establish and document their eligibility for HIP services. All ineligible and applicants who have not established their eligibility must be denied service. Ensure that BIA housing staff monitor and enforce tribal HIP contract compliance with eligibility requirements:

-A register of all projects completed since October 1, 1986: Sounds like it might be useful. However, it may also be a burdensome administrative requirement with which tribal contractors may not wish to comply. Always with the Bureau, particularly with HIP, is the issue of adequate program funding. We struggle with trying to get the greatest amount of construction possible out of the minuscule annual allowance ($112,000) we receive. We have one program staff who functions as an administrator/construction boss funded out of this amount. We do not have adequate funds to comply with every administrative initiative that non-construction Bureau personnel dream-up.

-Procedures for determining HIP applicant's financial resources: You can dig this hole of an administrative requirement as deep as you want to. If we had the funds, we could have a full-time financial eligibility worker for the over 100 applicants that currently have applications on file - but we don't. If the procedure isn't simple and doesn't have limits, it's probably too burdensome.

-The Indian Housing Authority must certify that HIP appli-cants are not eligible for HUD housing: Time consuming, bares a cost, and is administratively burdensome. These types of activities do not get the housing projects completed given the scope of the housing need in the community and the inadequate amount of annual funding.

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-The BIA area and agency offices must perform annual A-133 reviews: Not on tribal contracts! Not on our contract! The Bureau may perform an annual monitoring review of compliance with the provisions of our contract. Otherwise, our annual audit reports serve as a monitor of our adherence to A-128, which is the circular which governs RNSB's programs.

2. Deny Housing Improvement Program funding to all tribes that do not have valid and consistent inventories of housing needs with a detailed analysis of needs for each house: We are concerned with the validity of our housing inventory. It is in our best interest to have it as accurate and detailed as possible. But it would be a violation of the law for the Bureau to deny funding to a tribal contractor on the basis of not having valid and consistent inventories unless a contract proposal was properly declined in accordance with Section 102 (a)(2) of the Act or reassumed in accordance with Section 109 of the Act. Funding cannot lawfully be withheld, otherwise, from an existing contract.

In summary, we appreciate being consulted with in these matters, and are always glad to provide our input. We become deeply concerned, however, when our comments are not earnestly considered, as appears to be the case with those we sent in response to the proposed HIP rule in the Federal Register dated September 12, 1990. None of our comments were reported in the Final Rule published January 27, 1992. There was only a 60 day comment period for the proposed change while the Bureau took over one year before publishing the final rule and no meaningful tribal participation or consultation took place before or during this rule making process to our knowledge.

Now the "rule" making process for HIP continues on a different track with complete disregard for the P.L. 93-638 regulation drafting process which has been ongoing for four years, a process mandated to include the active participation of tribal governments and organizations, which is intended to result in all regulations relevant to Indian Self-Determination contracting being published in one place. With specific regard to the HIP Improvement Initiatives in the Deputy Commissioner's July 7 memo being imposed on tribal contractors, this is entirely out of order as are the current HIP regulations effective February 26, 1992.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

Bennie Cohoe, Executive Director

xc: Richard L. Evans, Supt., Ramah Navajo Agency

68-408 O - 93 - 5

COMMENTS ON THE BUREAU OF INDIAN AFFAIRS PROPOSED RULE ON THE HOUSING IMPROVEMENT PROGRAM

Ramah Navajo School Board, Inc.
November 13, 1990

The Ramah Navajo School Board, Inc., (RNSB) located in Pine Hill, New Mexico, has been contracting its Housing Improvement Program since 1978 pursuant to P.L. 93-638, the Indian Self-Determination Act. RNSB is on record in its contract as opposing the so-called HIP Model Contract, as the HIP Model Contract has exceeded the current regulations at 25 CFR 256 in its requirements imposed on tribal contractors, has been used by the Bureau to raise threshold issues in awarding continuing funding in our 638 contract, and as implemented by Bureau program people with regards to tribal contracts, has had the net effect of limiting local control over H.I.P. It is because of this that RNSB views the Bureau's proposed rule as unacceptable. Basically, the proposed rule seeks to institute the Bureau's policy of the Model Contract into regulation. It will have the effect of further limiting the flexibility of tribal contractors to implement H.I.P. locally, according to the plans, priorities and requests of the tribe/s served. The Bureau is seeking to give its Model Contract policy the weight of law in regulation, forcing tribal contractors to adhere to the specifics of a generic Bureau program and increasing Bureau control of those contracted programs.

The Indian Self-Determination Act was passed in 1975 to, among other things, assure maximum Indian participation in the direction of Federal services to Indian communities, giving them an effective voice in the planning and implementation of programs so as to render such services more responsive to the needs and desires of those communities. P.L. 100-472, the Indian Self-Determination Act Amendments, were passed in 1988 to remove many of the administrative and practical barriers that seem to persist under the Indian Self-Determination Act, and to increase tribal participation in the management of

Federal Indian programs. Congress intended regulations regarding contracts under the Indian Self-Determination Act to be relatively simple, straightforward, and free of unnecessary requirements or procedures (see Senate Report 100-274, p. 38)

The Bureau's proposed rule for HIP does not simplify, does not reduce requirements or procedures effecting 638 contracts, but instead has the opposite effect of increasing regulations and requirements. The proposed rule printed in the September 12, 1990, Federal Register, not only expands on most existing sections in the current regulation at 25 CFR 256, but adds two new sections and two appendices.

RNSB supports the refinement and simplification of the existing regulations, but the Bureau has not achieved this. Furthermore, RNSB objects to the Bureau publishing a proposed rule, which will have an impact on 638 contracted programs, outside of the well established process which the Bureau and tribes have been participating in together over the past two years to write implementing regulations for P.L. 100-472 and P.L. 93-638. The Act specifies that all requirements for self-determination contracts and grants under the Act shall be promulgated as regulations in conformity with 552 and 553 of Title 5, United States Code, and that the Secretary shall consider and formulate appropriate regulations with the participation of Indian tribes. Such proposed regulations are to contain all Federal requirements applicable to self-determination contracts and grants. RNSB finds that the Bureau's publication of the proposed rule for HIP with a 60 day comment period does not meet this statutory requirement.

It should be further noted that the proposed draft regulations for 638, particularly at Subpart O (Department of Interior Program Requirements), seem to be in conflict with the Bureau's proposed rule for HIP as regards tribal contracts. RNSB recommends that the Bureau either establish a work group open to

tribal representatives from each Area to convene and review the proposed rule for HIP with a view to refining and redrafting the proposed rule with meaningful tribal participation, or that it abandon its proposed rule completely. Should the proposed rule be revised with tribal participation, then it should be reviewed by the Coordination Workgroup (CWG) for 638 regulations which has already been established by the Bureau to meet the mandate of P.L. 100-472 with a substantial investment of time and resources. The CWG should then finalize the proposed rule, with any notes on differences between Bureau positions and Tribal positions left for the Assistant Secretary's review and decision. The proposed rule would then be ready for the Departmental clearance process and publication as a Notice of Proposed Rule Making.

In general, RNSB has supported use of Bureau policy, e.g., the B.I.A.M. or the HIP Model Contract, as non-binding guidelines for program implementation. However, we have stringent objection to the publication of past Bureau policy as regulation. Senate Report 100-274 made it clear that the intent of the Indian Self-Determination Act was not to impose internal agency procedures and methods on tribal contractors, but to enable the agency to provide technical assistance in a noncoercive manner for the improvement of tribal programs. The Bureau, as exemplified by this current proposed rule for HIP, seems unable or unwilling to meet this challenge and intent of the Act. The Bureau's response, instead, is to codify existing policy, i.e., the HIP Model Contract.

In summary, the RNSB objection to the proposed rule for HIP boils down to the issue of control. We view the proposed rule as a prolonging of Federal domination of Indian service programs serving to retard rather than enhance the progress of Indian people and their communities. As a prime example, the proposed rule at 256.3 Policy (d) sets a BUREAU EMPHASIS OF HIP "on repair and renovation of existing housing while other federally-assisted programs are

responsible for the bulk of the new house building." It goes on to set funding calculations to place, again, BUREAU EMPHASIS on repair. For a long time at Ramah Navajo the LOCAL TRIBAL EMPHASIS has been on using H.I.P. for new housing needs, since the overwhelming majority of the community live in substandard housing (70% without water, electricity and phone) in harsh climatic conditions. The community further cherishes the flexibility to change the emphasis of H.I.P. locally, in any given year, to address special electrification or water line projects, thereby enhancing the home environment and health status of those served. The proposed rule does not address these issues. RNSB believes that if the proposed rule is made final, that Bureau program personnel will interprate the rule in the most restrictive sense, setting up new barriers to Indian Self-Determination, creating new threshold issues to contracting, decreasing local control, flexibility, and decision making, and the history of Federal domination of Indian programs will continue to repeat itself.

Testimony Prepared
by
The Aberdeen Area Tribal Chairmens' Health Board
for
The Select Committee on Indian Affairs
Regarding
The Proposed DOI/DHHS Joint Regulations for P.L. 93-638
Indian Self-Determination and Education Act Amendments
on
May 14, 1993
Washington, D. C.

Good Morning Senator Inouye and Honorable Committee Members, I am **Donna Whitewing-Vandall**, Executive Director of the Aberdeen Area Tribal Chairmens' Health Board. Our Board Members are the elected Tribal Chairmen of seventeen Tribes in the States of North Dakota, South Dakota, Nebraska and Iowa and two Tribal/Urban Health Boards. They send their greetings to this Committee.

The Aberdeen Area Tribal Chairmens' Health Board has worked since 1989 to ensure active participation in the drafting of the 638 amendments. It has been a challenge and at time a frustration. One of the primary concerns of the Chairmen has been that regulations will be relevant, reasonable, applicable, and simple.

Tribal Governments take account every two, three or four years, as Tribal officers and Council members are reelected or replaced by their Tribal constituency. This type of accounting is dearly wished upon the Federal Bureaucracy by Tribal Administrative Officers, Fiscal Officers and Program Directors, as we struggle to make sense out of the volumes of regulations each Federal Agency promulgates. Whereupon, the creators of these rules, disappear into the fabric of the agencies.

Preparation of this document has forced a return to December of 1989, at the Ramkota Inn, in Aberdeen, South Dakota, when the Aberdeen Area Tribal Chairmens' Health Board called together representatives from each Tribe in the Area to address the proposed changes desired by the Tribes. These first preliminary documents and all related memos, letters and recommendations which came from the Tribes at that time.

Most of these recommendations are still relevant and necessary today The documents are attached to demonstrate the degree and amount of Tribal involvement with the proposed regulations changes, early in the development of the 638 amendments.

You will note from the lack of follow-up documents that the Aberdeen Area Tribal participation stopped abruptly when the Steering Committee was no longer funded for participation, in 1990, and those 6 Tribal members who continued with the Steering Committee were selected on the basis of their Tribes ability to fund their continued involvement When the proposed regulations entered the federal agency systems for review, in the last two years, communications with Tribes became slower and eventually came to a standstill

Tribal people continue to wait for the process to move forward in the development of the regulations

Tribes realize that the Federal Government must be accountable and has responsibilities to Congress in carrying out it's mandates Tribal Governments in several areas of the Country operate very much like the United States Government, that is understandable, as the United States patterned it's structure after a Tribal government. However, the Tribal Governments of the past, and of the present, allow for it's members to have direct input to decisions of the Government and the manner of application of Tribal laws. The sheer size of the current United States government is prohibitive of this "community" involvement and loops-upon-loops of "communities" and individuals can, sometimes, deflect the laws and their intents to assist Tribal people of this nation. The "Indian Agent" mentality of yesterday is still present in the current Department of the Interior and the Department of Health and Human Resources, perhaps, it is present in the Country also.

The 638 regulations changes needed by Tribes at their local levels were not large, nor complicated, as I think our attached documents will show. But, in the process of requesting change, we have prodded the sleeping behemoth, and the agency moves slowly. Too slowly.

In the past five years we estimate that we have lost a minimum of 1,368 human lives to the disease of alcoholism and chemical abuse. Some of these may have been avoided if prevention activities were allowed in the interpretation of the regulations. The amount of Tribal suffering and grief that has been endured, due to agency interpretation, is immeasureable.

Regulations from different Federal agencies may be in opposition or completely different in application at the Agency/Tribal level.

Tribes have no mechanism to ensure that they were being treated consistently and fairly in the application of these rules.

Tribes have no way to aprise the Federal agencies of the differences which exist, from region to region, across the Nation. The issue of Tribal "eligibility" has been a "hot potatoe" for nearly a decade in Indian Country. Several Tribes have made decisions in the past to open their enrollment to lineal decendency, recognizing Tribal blood to the smallest degree possible. Other Tribes have held to one-half or one-quarter degree of blood for enrollment as a Tribal member. This element, has a great impact on the "community" and government, even to the kinds of illnesses and behavior which is manifested at the local levels. These considerations are not given at the agency levels and these differences are not recognized not allowed for, and they have perhaps the greatest influence on Tribal governments and individual tribal members. In most areas where the traditional tribal governments exist, this has to be a consideration.

Nowhere in the regulations currently being proposed is there any provision made for "negotiations", in the true sense of the word. The Federal agencies prepare a budget, or expenditure plan and tribes come in and hear what their plan is and are coerced to accept this expenditure plan. This is not negotiations.

The pre award and proposal regulations are too long and cumbersome, they need to be streamlined.

The reporting process to Congress needs to include Tribal response to ensure that a true picture of the regulations at work is evidenced to our law-makers.

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A process needs to be identified, developed and applied, throughout the DOI/DHHS and other Federal Agencies, whereby special conditions of Tribes need to be "negotiated", at the local level. The rules and regulations need to expand for Tribes who are practicing Self-determination actively. Rather than constricting, to exclude advancing Tribal Nations and their organizations, Federal agencies need to encourage allow their contracting staff to interprete regulations in the widest manner possible, and in some cases reinterpreting regulations to a more applicable local scope Tribes recognize and understand that this kind of defination of regulations creates a maximum of interaction between parties and more work for the contractor. The end result of the current process is: frustration for everyone and a minimum of services reaches Tribal people

The services and programs of Federal agencies who work with Tribal Gov ernments needs to be examined, in the process of redrafing relevant regulations for use by all parties. At a time in our history when budget cuts and meaningful readjustments are being made. We want to ensure that Tribes, who have already suffered economically and socially through the past three century's are not forced to endure through the next century. The inclusion of Tribal input is crucial to further the development of teamwork and cooperation in our provision of programs and services to Tribal people

The current regulations may not have had to be redrafted if the 1975 regulations had included tribal participation from the levels of program and services

The final concern we feel needs to be expressed is the extraneous agencies which are not a part of any specific agency but operate autonomously without the pervue of Tribes. Specifically the Office of Engineering Services. It seems that they do not abide by the 93-638 regulations when they are working with Tribes, thorugh Indian Health Service, to design and construct health care facilities at the local levels. At what point and to which agencies do these regulations apply?

It is the firm conviction of the Aberdeen Area Tribes that the Office of Engineering Services needs to be merged into the Indian Health Service. This would do several things, save contracting funds, and

and allow more communications on tribal projects We further recommend that these offices be placed throughout Indian Health Services, where they are currently working on projects

There are many other examples of the far reaching effect of the 638 regulations which could be addressed here The Tribal goverments and their staff will take the time and continue, in good faith, to put forth their recommendations when the regulations are finally published for comment

We thank the Select Commitee on Indian Affairs for their time and attention to our concerns

INTER TRIBAL COUNCIL of ARIZONA

TESTIMONY
TO THE SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARINGS ON SELF-DETERMINATION AMENDMENTS
May 14, 1993

I. INTRODUCTION

My name is Nora Garcia. I am the Chairwoman of the Fort Mojave Indian Tribe. I am also the former President of the Inter Tribal Council of Arizona.

The Inter Tribal Council of Arizona is an association of 19 tribal governments that was formed in 1952 to provide a forum for tribal leaders to protect tribal sovereignty and to strengthen tribal government.

II. GOALS OF THE SELF-DETERMINATION ACT AMENDMENTS OF 1988

The tribal governments in Arizona were very active in working with the Senate Committee on Indian Affairs on the development of amendments to the Indian Self-Determination Act in 1987 and 1988. The joint work of the Committee and of tribal governments led to the Indian Self-Determination Amendments of 1988 (Public Law 100-472).

Public Law 100-472 was signed into law in 1988. For the past four and a half years, the former Administration has made only minimal efforts to implement Title II, the Indian Self-Determination Amendments, of PL 100-472.

I am here today to speak to the importance of Title II

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(the Self-Determination contracting provisions) of PL 100-472. According to the report of the Senate Committee on Indian Affairs (Senate Report 100-274), the 1988 Amendments were designed to solve several very specific problems for tribal Self-Determination contractors:

- To clarify that federal acquisition regulations (41 CFR) should not apply to Self-Determination contracts. (25 CFR and the Single Agency Audit Act would still apply to Self-Determination contracts.)
- To allow tribes that have successfully operated contracts for three or more years, and that have clean audits, to consolidate those contracts into one "mature" contract.
- To reduce the reporting requirements for "mature" contracts and to emphasize the role of the annual single agency audit in financial accountability.
- To provide protection for tribal contract funding against federal encroachments for federal pay costs, retirement costs, computer equipment costs, contract monitoring costs and other federal administration costs.
- To provide a framework for enabling the Congress to determine the amount of appropriations needed for tribal indirect costs.
- To insure that the Bureau of Indian Affairs and the Indian Health Service fully fund tribal indirect costs associated with Self-Determination contracts.
- To provide remedies for indirect cost rate problems caused by the failure of federal agencies other than the BIA or IHS to

fully fund their share of indirect costs.

- To provide Federal Tort Claims Act coverage for tribes carrying out Self-Determination contracts.
- To provide for Federal district court jurisdiction in contract disputes, and to provide that the Contract Disputes Act applies to Self-Determination contracts.

These were very important goals that were aimed at solving many of the most serious day-to-day, practical problems faced by tribal governments in Self-Determination contracting. They were developed with the active participation of tribal elected officials, finance directors, planners and program managers.

III. LEADERSHIP NEEDED TO IMPLEMENT THE 1988 AMENDMENTS

Measured against the goals outlined in the Senate Committee Report, much remains to be done to provide support for tribal Self-Determination Act contracting. We are confident that Secretary of the Interior Bruce Babbitt will provide leadership for the Department of the Interior in supporting tribal governments and Self-Determination contracting. Below are some of the areas of concern to tribes in Arizona, along with recommendations, many of which could be implemented administratively by Secretary Babbitt.

A. DOI AND BIA LEADERSHIP FOR SELF-DETERMINATION CONTRACTING

The prior Administration conducted "strategic planning" for the future of the BIA. The BIA Office of Program Planning issued a "Program Strategy Paper" in March, 1993. It is interesting to note that Tribal Self-Determination contracting is never mentioned as a priority for the BIA for the 1990's. In addition, the BIA's

"Strategic Mission Statement," which is on the walls of many BIA offices, mentions goals such as "Self-Governance" and "Improving BIA ADP Capabilities," but it never mentions tribal Self-Determination.

The prior Administration did not make Self-Determination contracting a priority. The branch of Self-Determination services continues to be buried in the BIA Central Office bureaucracy, down under the Division of Tribal Services. The FY 1993 budget for the branch was only $599,000 and 7 FTEs. The Branch of Self-Determination Services provides support to over 400 tribal governments and Indian organizations that have Self-Determination contracts.

By comparison, the prior Administration aggressively implemented Title III of Public Law 100-472. The prior Administration created an office of Self-Governance within the Office of the Secretary, and providing it with 8 FTEs and an annual budget of $689 000. The Office of Self-Governance provides support to approximately 30 tribes.

In the Phoenix Area, there used to be an Office of Self-Determination Services that reported directly to the BIA Phoenix Area Director. The Self-Determination Specialist functioned as an advocate for tribal governments within the Area Office with all of the program branches, the contracting branch and the finance branch.

The prior Area Director placed the Self-Determination specialist under the branch of contracting, which has defeated the

purpose of the position. The Self-Determination specialist no longer functions as an advocate for tribal governments or as a knowledgeable resource for BIA branch chiefs and Superintendents.

Recommendations:

The Secretary of the Interior should issue a statement to the tribal governments and to all levels of the Department and the BIA to express his clear support for Self-Determination contracting (and not only for Self-Governance demonstration projects).

Secretary Babbitt should require a monthly report from the Assistant Secretary for Indian Affairs regarding progress in Self-Determination contracting. The progress report should include the number of new Self-Determination contracts entered into with tribal governments, funding trends for tribal direct and indirect costs, contracting trends by Area, and significant accomplishments of tribal governments.

The next Assistant Secretary for Indian Affairs should require each Area Director to provide a monthly report on progress in Self-Determination contracting. Support for Self-Determination contracting should be the highest criteria for annual evaluations of the performance of each Area Director.

The branch of Self-Determination Services should be elevated to the Office of the Assistant Secretary for Indian Affairs. The branch of Self-Determination Services should function as the principal advocate for tribal government Self-Determination contracting within the BIA and within the Department of the

Interior. The branch should be fully funded to allow it to address the many complex problems of regulations development, training, delegation of authority, contract support funds and related concerns such as Office of Inspector General negotiations of indirect cost rates.

B. REGULATIONS

The lack of leadership for Self-Determination contracting is nowhere more obvious than in the length of time that it has taken the BIA and IHS to draft regulations to implement the 1988 Amendments. The regulations, and a process of consulting with tribal governments on the draft regulations, should have been the highest priority of the prior Administration.

Recommendations:

The Secretary of the Interior should require a monthly comprehensive status report on the implementation of all phases of the 1988 amendments to the Indian Self-Determination Act, including the promulgation of draft regulations.

It is important to publish the draft regulations that are currently being reviewed in the Department of the Interior and the Department of Health and Human Services. Publishing the regulations in the Federal Register will provide all tribal governments with an opportunity to review the draft regulations. At that time, tribes can advise the Clinton Administration on whether or not the Administration can use the draft as a framework for developing appropriate final regulations.

Furthermore, the Secretary of the Interior should direct each

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Area Office to sponsor a meeting, jointly planned with the tribal governments and the inter-tribal organizations in each Area, to review and discuss the draft regulations. The discussions and comments of tribal government representatives at the Area meetings should be recorded and made a part of the record for the consideration of the draft regulations.

There may be advocates that would call for a national meeting to discuss the proposed regulations. That would be fine. However, a national meeting should be held in addition to Area meetings. Not everyone who is interested can travel to national meetings because of expenses or scheduling. Holding separate Area meetings will ensure that a broad range of tribal government representatives have an opportunity to fully review and discuss the regulations.

C. FEDERAL ACQUISITION REGULATIONS

Although PL 100-472 defined Self-Determination contracts to not be procurement contracts and clarified that Federal Acquisition Regulations should not apply (except to construction contracts), the BIA continues to apply all of the provisions and the spirit of the FARs to Self-Determination contracting.

For example, in the Phoenix Area, the branch of contracting is called **The Branch of Acquisition, Federal Assistance and Property Management.** This is a poor description for a branch that is supposed to provide assistance to tribal governments for non-procurement Self-Determination contracts. The branch continues to treat tribal governments as adversaries, rather than as partners, in the field of Indian affairs. The branch uses FARs as a weapon

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against tribal contractors.

Recommendation:

The Administration should issue a clear statement to the BIA Area Offices that Federal Acquisition Regulations do not apply to non-construction contracts.

In addition, the Area Offices should clearly differentiate between procurement contracts (638 construction contracts and contracts to purchase goods and services for the benefit of the government) and Self-Determination contracts. The branches of contracting should be functionally organized into two sections. One section would provide **Assistance** to tribal Self-Determination contractors. The Self-Determination Section would be perhaps 75 percent of the contracting branch workload. The Procurement Section would deal with "638" construction contracts and other non-638 procurement contracts.

In some Areas, the resources and the FTEs for the Self-Determination Section should be transferred to the Agencies, along with the delegation of authority for Self-Determination contract approvals. Any such delegation of authority and transfer of resources to the Agencies should be done only with the full and complete participation of the affected tribal governments.

In the Phoenix Area, the Self-Determination Specialist position should be removed from the "Branch of Acquisition, Federal Assistance and Property Management," and should be placed within the Office of the Area Director. The Area Director should then appoint a Self-Determination Specialist who is familiar with the

law, including the 1988 Amendments, and with tribal governments.

D. INDIRECT COSTS

One of the most positive aspects of the 1988 Amendments was the clear policy statements regarding indirect costs. Indirect costs pay for tribal annual single agency audits and for other centralized administrative functions such as payroll, property management and contracts and grants management. Many of the functions paid for out of indirect costs are functions required by the Federal government.

In the early 1980's, the Administration failed to request adequate funds to pay for Contract Support Funds. The BIA would have a "shortfall" of Contract Support Funds and would request that the shortfall be made up through supplemental appropriations. When the Senate Committee on Appropriations questioned why the BIA ran short on Contract Support Funds every year, the BIA replied, in the FY 1985 Budget Justifications to the Congress:

> [the decision to fund] tribal indirect costs associated with Public Law 93-638 contracts * * * through a separate Contract Support Fund * * * did not, as intended, merely provide for the additional funds required for a tribe to manage a new program, * * * it also created an open-ended, uncontrollable, entitlement fund, the size and distribution of which depended solely on the intiative and ingenuity of each tribe in expanding its administrative organization and shifting the maximum amount of expenses to the indirect, rather than direct,

category.

In other words, the Administration accused the tribes of abusing the Contract Support Fund! However, an objective study conducted by the DOI Office of Inspector General in 1983 concluded that there were valid reasons for the increases in indirect costs associated with Self-Determination contracts. The reasons were:

- The requirement for annual single agency audits, which required tribes to purchase the audits from independent auditing firms.
- The elimination of the CETA Public Service Employment program which funded many tribal government positions such as accounting and payroll clerks.
- The increase in time that tribal councils had to devote to administrative policy matters such as the decision to contract a program or the design of a financial accounting system.

(Department of the Interior, Office of Inspector General, Trend Analysis Using Data Available From the Indirect Cost Rate Negotiation Process with Indian Tribes, July 1983).

One of the problems with the current system is that the Regional Offices of the Office of Inspector General have an enormous workload associated with the negotiation of indirect cost rates.

The BIA Central Office has withdrawn $1.5 million of the FY 1993 allocation to the Phoenix Area for contract support. This is a decrease of 30 percent. If the BIA fails to pay its full share of indirect costs on "638" contracts, there will be two impacts:

- Tribes that are fortunate enough to have independent revenue from trust funds or enterprises will be forced to subsidize the BIA's contract support shortfall. This will deprive tribes of funds that might otherwise be used for economic development.
- Tribe that do not have independent revenue will be forced to run a deficit in their indirect costs collection, which will create problems with their next annual audit and with their next indirect cost negotiation.

The BIA Central Office withdrew the $1.8 million over the objections of the Phoenix Area Director and without consulting the affected tribes. The Inter Tribal Council of Arizona has asked Secretary Babbitt to direct the BIA to restore the funds to the Phoenix Area tribes. The 1988 amendments were designed to prevent the problems described above.

One of the tools available to the Administration and to the Congress to prevent shortfalls in Contract Support Funds is the **Annual Report to the Congress on Indirect Costs** required by the 1988 Amendments. This is an extremely important, but little known report which has been issued for the past three years. Public Law 100-472 requires the Secretary of the Interior and the Secretary of Health and Human Services to provide an annual report to the Congress on the amounts and types of "638" contracts for each tribe, the indirect cost rate for each tribe, the amount of contract support funds available, and the shortfall in contract support funds, if any.

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The first year that the report was issued, it contained a valuable analysis of the trends in "638" contracting by Area as well as easy-to-read data. For the past two years, however, the report has deteriorated. There is no analysis of contracting trends and the data is difficult to read and interpret.

Recommendations:

The Secretary of the Interior should request additional funds for the Office of Inspector General to catch up on the backlog of work associated with negotiating indirect cost rates with tribes. The Secretary should also utilize the expertise and experience of the Office of Inspector General in developing recommendations to improve the process of negotiating, approving and auditing tribal indirect cost rates.

The Secretary of the Interior should issue a statement that declares the policy of the Department of the Interior to fully fund indirect costs associated with Self-Determination contracts, as required by Public Law 100-472. Under no circumstances should contract support funds be withdrawn from tribal contracts in order to meet shortfalls in other program areas.

The Secretary of the Interior should direct the BIA to improve the quality and availability of the Annual Report to the Congress on Indirect Costs. The report should be automatically mailed to all tribal governments.

In addition, the Secretary of Health and Human Services should require the Director of the Indian Health Service to issue an annual report on Self-Determination contracting with the IHS, with

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specific attention paid to the question of indirect costs.

E. SELF-DETERMINATION GRANTS

Self-Determination grants are important for two purposes:

1. To provide a tribe that wishes to contract a BIA program with the necessary resources to conduct careful planning; and
2. To provide tribes that already contract programs with the resources to conduct program evaluations, to strengthen tribal administrative systems and to improve program quality.

In 1981 the funding level for Self-Determination Grants was over $17 million annually. The funding level for Self-Determination grants in FY 1993 was $4.2 million.

There was a strong surge of tribal Self-Determination contracting between 1975, when the law was enacted, and 1981. After 1981, progress in Self-Determination Act contract slowed. Tribes have struggled during the past twelve years to contract programs, but it has been difficult because of the failure of the BIA to request increased funds for Tribe/Agency Operations and because of the failure of the BIA to fully fund indirect costs. The third reason for the lack of progress in Self-Determination contracting has been the unavailability of planning funds. Only those tribes that have independent sources of revenue have been able to fund the planning needed to take over complex functions such as natural resources or trust responsibility programs.

Recommendation:

The Secretary of the Interior should commit the BIA to a long-range effort to assist tribe to plan for assuming the control of

BIA programs using Self-Determination Grants.

F. TRAINING

Training on the Indian Self-Determination Act is needed for the tribes and for the BIA at all levels. There have been so many changes since 1988 that it is difficult to keep abreast of all of the developments. The changes include:

- The 1988 Amendments.
- Several sets of technical amendments.
- The change from the letter-of-credit system to the P-638 payment system.
- The Federal Financial System (FFS).
- Changes in the BIA budget categories and account codes.
- The Tribal Budget System (TBS).

Recommendation:

The Secretary of the Interior should provide funds to tribes in each of the twelve BIA Areas to conduct training on all of the above areas. The $500,000 that the BIA is requesting for FY 1994 for the so-called Office of Program Planning should instead be given to the tribes conduct training and to support the Tribal Budget System (TBS) and Self-Determination.

The Inter Tribal Council of Arizona
May 12, 1993

TESTIMONY OF [redacted]
POARCH BAND OF CREEK INDIANS
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARINGS ON REGULATORY IMPLEMENTATION
OF THE
1988 INDIAN SELF-DETERMINATION ACT AMENDMENTS

SENATOR INOUYE AND MEMBERS OF THE SENATE COMMITTEE ON INDIAN AFFAIRS,

MY NAME IS BUFORD ROLIN AND I AM A TRIBAL MEMBER AND THE VICE-CHAIRMAN OF THE POARCH BAND OF CREEK INDIANS OF ALABAMA. I ALSO SERVE AS THE TRIBAL HEALTH ADMINISTRATOR, AND, IN THE CAPACITY OF CHAIRPERSON OF THE UNITED SOUTH AND EASTERN TRIBES' HEALTH COMMITTEE, WHOSE MEMBERSHIP CONSISTS OF THE TWENTY HEALTH DIRECTORS IN THE NASHVILLE AREA OF INDIAN HEALTH SERVICES. I AM THE NASHVILLE AREA REPRESENTATIVE TO THE NATIONAL INDIAN HEALTH BOARD AND A MEMBER OF IHS TRIBAL 638 STEERING COMMITTEE/PROGRAM WORK GROUP/CWG.

I COME BEFORE THIS DISTINQUISHED COMMITTEE TO SEEK AN ANSWER TO THE QUESTION OF WHY THERE CONTINUES TO BE A DELAY IN THE PUBLICATION OF THE IMPLEMENTING REGULATIONS OF THE 1988 INDIAN SELF-DETERMINATION AMENDMENTS BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND THE DEPARTMENT OF THE INTERIOR. THE OTHER TRIBAL PANEL MEMBERS PRESENT HERE HAVE SPOKEN QUITE ELOQUENTLY AND HAVE CLEARLY IDENTIFIED THE COLLECTIVE CONCERNS AND FRUSTRATIONS OF THE TRIBAL LEADERS AND THOSE OF US IN THE INDIAN HEALTH PROFESSION ACROSS THIS COUNTRY. <u>THIS CONTINUED DELAY IMPEDES THE FULL IMPLEMENTATION OF THE 1988 INDIAN SELF-DETERMINATION AMENDMENTS SUPPORTED BY ALL THE TRIBES.</u>

THIS CONTINUED DELAY, AND THE CONTENT OF THE LATEST DRAFT REGULATIONS, ALSO REFLECTS THE UNWILLINGNESS ON THE PART OF DHHS AND DOI TO EMBRACE THE ACT AND THEIR INABILITY TO PROCEED IN GOOD FAITH AND EARNEST OF PURPOSE TO COMPLETE THE IMPLEMENTATION OF THE 638 REGULATIONS CONSISTENT WITH CONGRESSIONAL INTENT. AS A MEMBER OF THE IHS/TRIBAL 638 STEERING COMMITTEE, I AM DEEPLY CONCERNED ABOUT THE SUBSTANTIAL INTERDEPARTMENTAL DISAGREEMENTS AND THE LACK OF TRIBAL PARTICIPATION AND CONSULTATION IN

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THE RULES MAKING FORMULATION. TRIBAL LEADER CONSULTATION IS PARAMOUNT IN THE IMPLEMENTATION OF THE 638 AMENDMENTS. TRIBAL LEADER CONSULTATION REFLECTS TRUE RESPECT FOR THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP. TRIBAL LEADER PARTICIPATION IS THE CORNERSTONE OF THE TRUST RESPONSIBILITY. TRUE TRIBAL CONSULTATION IS THE PROCESS BY WHICH THE FEDERAL GOVERNMENT RECOGNIZES THE SOVEREIGNTY OF INDIAN NATIONS.

PRESUMABLY, BIA AND IHS ARE CONCERNED THAT BY EMBRACING THE 638 CONTRACTING PROCESS, TRIBES WILL DISMANTLE BOTH FEDERAL AGENCIES AND WILL CONTRACT FOR VARIOUS FUNCTIONS AT DIFFERENT LEVELS OF BIA AND IHS, BE IT THE AGENCY LEVEL, AREA LEVEL OR NATIONAL LEVEL. THERE APPEARS TO BE A REACTIVE EFFORT TO FIND WAYS TO PRESERVE THEIR AGENCIES, THROUGH THE FORMULATION OF RESTRICTIVE REGULATIONS AND MISINTREPATIONS OF THE ACT, AT THE EXPENSE OF THE TRIBES. CONGRESS MUST ACT TO PREVENT THE FORMULATION OF 638 REGULATIONS RIDDEN WITH CRITICAL AND SEVERE DEFICIENCIES, AMBIGUITY OF LANGUAGE AND INSUFFICIENT EXPLANATION, AND SERIOUS INTRUSION INTO THE SOVEREIGNTY AND SELF-DETERMINATION OF TRIBES. THE REGULATIONS BEING PROPOSED ARE IN DIRECT CONFLICT WITH THE LAW AND CLEARLY VIOLATE THE INTENT OF CONGRESS.

I WOULD NOW LIKE TO ADDRESS THREE OF THE ISSUES THAT ARE OF GREATEST CONCERN TO MY TRIBE, AND THOSE OF THE TWENTY TRIBES REPRESENTED BY UNITED SOUTH AND EASTERN TRIBES. THESE ARE CONTRACT SUPPORT/INDIRECT COSTS, INDIAN PERFERENCE AND FEDERAL TORT CLAIMS.

CONTRACT SUPPORT / INDIRECT COSTS:

~~NO BASE~~ ISSUE WITH THE WAY THE INDIAN HEALTH SERVICE AND THE BUREAU OF INDIAN AFFAIRS HANDLE CONTRACT SUPPORT AND INDIRECT COSTS. MANY DISPUTES ARISE FROM THE MISINTERPRETATION AND MISAPPLICATION OF THE REGULATIONS GOVERNING CONTRACT SUPPORT COSTS. CONTRACT SUPPORT COSTS AND INDIRECT COSTS ARE AN ENTITLEMENT BY LAW THAT WAS PRESERVED BY CONGRESS. SECTION 205 OF P.L. 936 AS AMENDED IN 1988 NOW INCLUDES SECTION 106 (A) (1) AND (2). THIS, STATES THAT "THE AMOUNT OF FUNDS PROVIDED UNDER THE TERMS OF SELF-DETERMINATION CONTRACTS ENTERED INTO PURSUANT TO THE ACT SHALL NO BE LESS THAN THE APPROPRIATE SECRETARY WOULD HAVE OTHERWISE PROVIDED FOR

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THE OPERATION OF THE PROGRAMS OR PORTIONS THEREOF FOR THE PERIOD COVERED BY THE CONTRACT." FURTHER, SECTION 106(2) STATES THAT CONTRACT SUPPORT COSTS BE ADDED TO THE EXTENT NEEDED BY TRIBAL CONTRACTORS TO MAINTAIN COMPLIANCE WITH THE TERMS OF THE 638 CONTRACT AND FOR PRUDENT MANAGEMENT. **THIS IS NOT HAPPENING.**

IN THE ABSENCE OF FULL FUNDING, IHS AND BIA FORCE TRIBAL CONTRACTORS TO BEAR THE BRUNT OF SHORTFALLS IN FUNDING PROGRAMS AND IN THE ADMINISTRATION OF 638 CONTRACTS. CLEARLY THIS WAS NOT THE INTENT OF CONGRESS WHEN IT ENACTED THE LAW. CURRENT PRACTICE AND THE PROPOSED REGULATIONS ARE BEING MISINTERPRETED BY IHS AND BIA AND ARE IN DIRECT CONFLICT WITH THE LAW.

WITHIN THE UNITED STATES AND EASTERN TRIBES, $1.3 MILLION IS THE DOCUMENTED INDIRECT COST SHORTFALL FOR INDIAN HEALTH SERVICES. MOREOVER, PROGRAMS ARE OPERATING AT A 50-60% LEVEL OF FUNDING. COMPOUNDING THE CRISIS FOR ALL TRIBAL CONTRACTORS, THE SHORTFALL THAT EXISTS FOR THE ENTIRE COUNTRY IS REPORTED TO BE $26 MILLION DOLLARS (ALTHOUGH WE SUSPECT IT IS IN FACT MUCH HIGHER).

TRIBAL CONTRACTORS ARE NOW AT RISK IN THEIR EFFORTS TO MAINTAIN QUALITY HEALTH CARE AT 50-60% FUNDING LEVELS, COMPOUNDED BY NOT RECEIVING ADEQUATE CONTRACT SUPPORT COSTS AND INDIRECT COSTS. REMEMBER THAT THESE INDIRECT COSTS RATES WERE NEGOTIATED IN GOOD FAITH WITH THE APPROPRIATE FEDERAL AGENCY, TYPICALLY THE INTERIOR OFFICE OF INSPECTOR GENERAL.

CONTRARY TO THE STATUTE, THE DRAFT REGULATIONS DESCRIBE THE FUNDING MECHANISM IN SUCH A WAY THAT THE SECRETARY WILL NOT BE REQUIRED TO TURN OVER ALL FUNDS WHICH DIRECTLY SUPPORT A PROGRAM. RATHER, THE SECRETARY CAN WITHHOLD A PORTION OF SUCH FUNDS AND REQUIRE THE TRIBAL CONTRACTOR TO SECURE THE BALANCE AS "CONTRACT SUPPORT COST" FUNDING. IT IS THIS TYPE OF MANIPULATION OF CONTRACT FUNDING WHICH CONGRESS SOUGHT TO CORRECT IN THE 1988 AMENDMENTS.

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THE PROPOSED REGULATIONS, TO MAKE MATTERS WORSE, ENTITLE THE TRIBAL CONTRACTOR NOT TO ITS FULL CONTRACT SUPPORT COSTS, BUT ONLY TO SUCH CONTRACT SUPPORT COSTS AS THE SECRETARY CHOOSES TO ALLOCATE TO THE TRIBAL CONTRACTOR FROM AVAILABLE APPROPRIATIONS!

THIS IS UNACCEPTABLE. THE MANDATE OF THE ACT REQUIRES FULL FUNDING OF CONTRACTS.

SECTION 900 (F) OF THE PROPOSED REGULATIONS ESTABLISHES A TROUBLING PRESUMPTION THAT CONGRESS, WHEN IT APPROPRIATES FUNDS FOR THE SPECIFIC BENEFIT OF A PARTICULAR TRIBE, INTENDS TO INCLUDE CONTRACT SUPPORT COSTS IN THAT AMOUNT IN THE EVENT THE TRIBE OPERATES THE FUNDED PROGRAM UNDER A "638 CONTRACT". PRESENTLY, THIS IS THE SYSTEM EMPLOYED BY THE INDIAN HEALTH SERVICE, THOUGH NOT THE BUREAU OF INDIAN AFFAIRS.

WHAT OCCURS IS THIS: IHS TAKES CONTRACT SUPPORTS COSTS OFF THE TOP OF A PROGRAM, AND THEN AWARDS THE TRIBE THE FULL APPROPRIATED AMOUNT INTO INDIRECT AND CONTRACT SUPPORT COSTS. IN THIS MANNER, AT THE EXPENSE OF TRIBAL CONTRACTORS, THE FUNDS CONGRESS INTENDED FOR THE DIRECT PROVISION OF A PARTICULAR PROGRAM ARE ACTUALLY REDUCED IN ORDER TO FUND IHS ADMINISTRATIVE COST NEEDS. THE BIA, ON THE OTHER HAND, ADDS THE CONGRESSIONAL SUM TO THE DIRECT FUNDING BASE AGAINST WHICH INDIRECT COSTS ARE CALCULATED, LEADING TO AN INCREASED INDIRECT COST NEED WHICH THEN IS FUNDED FROM AVAILABLE APPROPRIATIONS.

TO DENY TRIBES THEIR FULL DIRECT SECRETARIAL AMOUNT FOR THESE FUNCTIONS IS DIRECTLY CONTRARY TO THE STATUTE AND DISCRIMINATES AGAINST SELF-DETERMINATION CONTRACTING.

INDIAN PREFERENCE

MOVING ON TO THE ISSUE OF INDIAN PREFERENCE AND HOW IT IS DEFINED IN THE PROPOSED 638 REGULATIONS, SECTION 900.115.

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UNDER THE PROPOSED REGULATIONS, CONTRACTORS MUST, TO THE GREATEST EXTENT FEASIBLE, GIVE PREFERENCE TO INDIANS REGARDLESS OF TRIBAL AFFILIATION IN TRAINING AND EMPLOYMENT.

A CONTRACTOR, HOWEVER, IS SUBJECT TO ANY SUPPLEMENTAL INDIAN PREFERENCE REQUIREMENTS ESTABLISHED BY THE TRIBE RECEIVING SERVICE UNDER THE CONTRACT.

IN THE PROPOSED REGULATIONS, THE AGENCIES WILL SOLICIT PUBLIC COMMENT WHETHER THE REGULATIONS SHOULD PROHIBIT TRIBES FROM FORCING SUPPLEMENTAL REQUIREMENTS WHICH GIVE PREFERENCE TO INDIANS ON ~~THE BASIS OF~~ MEMBERSHIP IN, OR AFFILIATION WITH, A PARTICULAR TRIBE. IT APPEARS THAT AN OPINION BY THE DEPARTMWENT OF INTERIOR IN 1986 CONCLUDED THAT SUPPLEMENTAL REQUIREMENTS WERE PROHIBITED. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES QUESTIONS THE DOI'S INTERPRETATION OF THE ACT'S REQUIREMENTS REGARDING INDIAN PREFERENCE.

~~RESPECTIV~~, ~~THE~~ PART A, SECTION 900.115, SUBPARAGRAPHS A, B, AND C NEED TO BE CLARIFIED TO RESOLVE THE INTERDEPARTMENTAL DISAGREEMENT REGARDING TRIBAL PREFERENCE POLICIES; AND TO AVOID A SERIOUS INTRUSION INTO THE SOVEREIGN DETERMINATION OF A TRIBE HOW TO BEST IMPLEMENT THE GOAL OF INDIAN PREFERENCE MANDATED BY CONGRESS.

AS A MATTER OF TRIBAL DISCRETION, TRIBAL PREFERENCE MUST SUPERCEDE A GENERAL INDIAN PREFERENCE AS A TRIBAL APPLICATION OF TRIBAL SOVEREIGNTY.

TO NULLIFY TRIBAL SOVEREIGNTY BY AMBIGIOUS AND CONTRADICTORY LANGUAGE IS UNACCEPTABLE.

THE LAW CLEARLY PERMITS A THREE-TIER PREFERENCE POLICY UNDER WHICH QUALIFIED TRIBAL MEMBERS RECEIVE FIRST PREFERENCE, QUALIFIED INDIANS AND ALASKA NATIVES A SECOND PREFERENCE, AND THE POSITION IS THEN OPENED TO OTHER QUALIFIED PERSONS.

THE REGULATIONS MUST MAKE CLEAR THAT THERE MUST BE COMPLIANCE WITH TRIBAL LAW IN EMPLOYMENT PRACTICIES.

FEDERAL TORT CLAIMS ACT COVERAGE

THE LAST ISSUE I WOULD LIKE TO ADDRESS, BUT NOT IN ITS ENTIRETY, IS THE FEDERAL TORT CLAIMS ACT COVERAGE.

I WOULD SAY THAT I SUPPORT THE POSITION OF TRIBAL LEADERS AND INDIAN HEALTH PROFESSIONALS WHO WERE IN ATTENDANCE IN DENVER FOR THE NATIONAL IHS/TRIBAL CONSULTATION CONFERENCE. THAT IS:

SUB-PART I, SECTION 900.903 NON-MEDICAL RELATED FEDERAL TORT CLAIMS ACT PROVISIONS, SUB-PARAGRAPHS A MUST BE REWRITTEN, CLARIFIED OR BE STRICKEN FROM THE PROVISIONS DUE TO AMBIGUITY OF LANGUAGE AND INSUFFICIENT EXPLANATION REGARDING PROCEDURES AND SCOPE OF FTCA COVERAGE.

I AM IN AGREEMENT WITH PROPOSED REGULATIONS WHICH STATE THAT INSURANCE "REQUIRED BY LAW OR REGULATION FOR THE RESPONSIBLE OR BUSINESSLIKE OPERATION OF A CONTRACT" SHALL BE AN ALLOWABLE COST. THIS HAS BEEN AN ONGOING ISSUE WITH IHS, WHICH BELIEVES FTCA IS SUFFICIENT.

SOME TRIBES HAVE PAID FOR PRIVATE LIABILITY INSURANCE ONLY TO FIND THAT THE COST IS LATER DISALLOWED (i.e., liability coverage for GSA leased motor vehicles used in the operation of the program.)

FINALLY, I WOULD LIKE TO CONCLUDE MY REMARKS BY ASKING THE SENATE COMMITTEE OF INDIAN AFFAIRS TO URGE THE DOI AND DHHS TO MOVE FORWARD THE WITH ADOPTION OF NEW AMENDMENTS TO FURTHER THE INTENT OF CONGRESS, AS RECENTLY RESUBMITTED TO THE COMMITTEE THROUGH OUR ATTORNEYS.

TRIBAL LEADERS PRESENT IN DENVER ARE CALLING FOR REAL TRIBAL CONSULTATION IN THE CONTINUANCE OF POSITIVE CHANGE IN REGULATIONS. THEY EXPRESSED THEIR DISPLEASURE IN THE WAY THE REGULATIONS ARE FORMULATED BY

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DOI/DHHS, THE LACK OF PROPER TRIBAL CONSULTATION AND THE FAILURE OF DOI/DHHS TO INTERPRET THE LAW AS ENACTED.

PRIORITY SHOULD BE GIVEN TO TRIBES TO FORMULATE REGULATIONS THAT CALL FOR SIMPLIFICATION, LESS INTRUSIVE AND CUMBERSOME REGULATIONS. THIS WAS THE INTENT OF CONGRESS IN 1988.

I WOULD LIKE TO TAKE THIS OPPORTUNITY TO ACKNOWLEDGE THE SUPPORT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS (NCAI), THE NATIONAL TRIBAL LEADERS FORUM, AND THE NATIONAL INDIAN HEALTH BOARD (NIHB) FOR ADOPTING RESOLUTIONS SUPPORTING OUR POSITION ON THE 638 REGULATIONS AND OUR CALL FOR NEW STATUTORY AMENDMENTS, AND ALSO, THE INDIAN HEALTH SERVICE FOR HOLDING 638 MEETINGS TO UPDATE TRIBES ON THE LATEST CHANGES IN THE PROPOSED REGULATIONS. STILL, IT MUST BE NOTED THAT THERE HAS NOT BEEN REAL CONSULTATION WITH TRIBES SINCE SEPTEMBER 1991.

THANK YOU FOR THE OPPORTUNITY TO SPEAK AND ADDRESS THIS DISTINGUISHED COMMITTEE.

Before the
United States Senate Indian Affairs Committee

Oversight Hearing on Regulatory Implementation
of the Indian Self-Determination and
Education Assistance Act Amendments of 1988

Testimony of Lloyd Benton Miller
Sonosky, Chambers, Sachse & Endreson
Sonosky, Chambers, Sachse, Miller & Munson

May 14, 1993

My name is Lloyd Miller. For the record, I am a partner in a private, public-interest law firm representing Native American tribal interests throughout the United States from Maine to Alaska. For the last decade a major focus of my practice has been representing tribes and tribal organizations in matters relating to the Indian Self-Determination and Education Assistance Act of 1975. We represent both some of the smallest tribes in the United States in such matters, as well as the largest tribal contractor in the Nation (the Yukon Kuskokwim Health Corporation, operating a $38 million IHS hospital in Bethel, Alaska).

Beginning in 1986 we worked closely with our tribal clients to bring to this Committee's attention the need for a legislative overhaul of the Indian Self-Determination Act, in order to overcome the persistent and entrenched resistance of the Department of the Interior and the Department of Health and Human Services to the imperatives of the Act. Further, we worked closely with Committee staff in the course of the 1987 oversight hearings, and later in the development of the bill (S. 1703) which ultimately became the 1988 Amendments.

My involvement in regulatory implementation of the 1988 Amendments began almost immediately after the Act was signed into law in early November 1988. Within days after the Act's passage I facilitated a meeting in Denver hosted by the National Indian Health Board (NIHB) with key IHS officials, elected tribal leaders and tribal health administrators to develop a blueprint for the development of new regulations. Under the direction of NIHB I also authored the report from those deliberations which set the guidelines for future tribal participation in the regulatory process.

In November 1988 I also participated in two of the twelve Area meetings co-hosted by the Bureau of Indian Affairs and the Indian Health Service. In addition, in March 1989 I participated extensively in two national regulatory drafting workshops co-hosted by the two agencies in Nashville and Albuquerque. Those deliberations led to the issuance of an April 3, 1989 joint tribal-federal working draft. After a very different federal draft regulation was released in December 1989, we again prepared voluminous comments on behalf of our clients and attended two Area meetings, all in an effort to return to the negotiated draft reflected in the April 1989 document.

Once tribal-federal negotiations recommenced between March 1990 and August 1990, I attended virtually every "Coordinating Work Group" meeting convened by IHS and BIA and authored countless tribal position papers and legal memoranda, a process which ultimately led to the issuance of a new tribal-federal draft in September 1990.

From September 1990 to the present, I have continued to serve on the four-member Tribal Negotiating Team comprised of the late Lionel John, former Executive Director of United South and Eastern Tribes, Chairman W. Ron Allen of the Jamestown S'Klallam Tribe of Washington, and Britt Clapham, Assistant Attorney General to the Navajo Nation. Unfortunately, throughout this period the Departments have paid precious little attention to tribal input, resulting in the unfortunate January 1993 draft which has led to this hearing.1/

1. The lack of tribal participation in the regulatory process

Mr. Chairman, as other witnesses have already discussed, the regulatory process is not going well, and certainly does not reflect the sort of tribal "active participation" the Committee anticipated when, in 1988 it "expect[ed] the Secretary of the Interior and the Secretary of Health and Human Services to work closely with tribes in the initial drafting of these regulations, as well as in the subsequent refinement of proposed rules for publication." S. Rep. No. 100-274 at 38. Rather, after cosmetically indulging the emphatic demands of tribal representatives and the insistence of this Committee that tribes be involved in the regulatory process, *from August 1990 until the present -- nearly three years -- virtually no meaningful tribal participation has been permitted.* Thus, the Departments, working behind closed doors, have at a snail's pace developed a draft set of regulations which seek to inhibit,

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1/ Throughout this time I have also sat as a non-voting member of the IHS "638" Steering Committee to monitor the entire regulatory process.

complicate and burden, rather than encourage, simplify and expedite, tribal contracting under the Act.

2. Departmental delays in promulgating regulations

The bureaucratic delays experienced in the regulatory process have been nothing less than outrageous. Initially, BIA and IHS were reluctant to work together at all. Not until eleven months after enactment of the 1988 Amendments -- and one month after the final regulations were to have been promulgated under Congress's original schedule -- did the two agencies finally co-sign a letter formally committing to work together in the development of joint regulations. Even after the BIA and IHS rejected the negotiated tribal-federal April 1989 draft and produced their own joint draft in December 1989, the federal draft lacked the endorsement of the other Interior Department agencies. Six months of subsequent meetings with the tribal-agency coordinating work group proved to be as much a setting for the airing of disputes among BIA's sister agencies as it was a setting for negotiations with tribes.

Not until December 1990 -- over two years after enactment of the 1988 Amendments -- did Secretary of the Interior Manuel Lujan finally issue a directive to all Interior bureaus and agencies to join together in developing new implementing regulations. Then, another year passed before each Department issued not a new joint draft, but two separate versions of implementing regulations. It would be yet another full year before issuance of the current

January 1993 draft. (A copy of the draft has been provided to the Committee with this testimony.)

Even today, we can not see the light at the end of the regulatory tunnel. Secretary Babbitt and Secretary Shalala have yet to complete their review of the draft regulations, a process which we are informed by agency officials may well take an additional two or three months. (Ironically, agency officials have complained to us that if any further changes are now made in the draft -- in response to tribal criticisms -- a two or three month additional *departmental* clearance process will ensue before the draft is submitted to Office of Management and Budget.)

Next, we are informed that clearance for publication in the *Federal Register* may consume an additional two or three months within the OMB, given the complexity and length of the proposed regulations. Adding the one-month statutory period during which the draft regulation must be lodged with this Committee and the House Natural Resources Committee prior to publication, mere issuance of the regulation in the *Federal Register* as a "notice of proposed rulemaking" (or NPRM) is between at least six and eight months away.

Moving along, the current draft contemplates a four-month comment period. The Departments anticipate a large number of comments, and during this period are planning both a national open tribal meeting and a series of regional tribal meetings to review the draft regulation as part of the formal comment process. Agency officials further inform us

that at least three months (and possibly six months) will be required for the comments to be thoroughly reviewed and responded to as required by the Administrative Procedures Act; for appropriate changes, if any, to be made in the final regulation; and for the final regulation to once again be cleared through the two Departments and through OMB. In sum, *final publication of implementing regulations is close to two years away.* In the meantime, as you have heard this morning, BIA Agency, IHS Service Unit and other line officials continue to operate largely as if the 1988 Amendments had never been enacted.

At the end of the process, a good seven years will have been consumed in developing implementing regulations. Particularly given the intent in 1988 to simplify the 638 contracting process, it is difficult to attribute any other cause for the delay than an intense resistance by the mid-level career bureaucracy within each Department to the reforms mandated by Congress.

3. Overview of the January 1993 draft regulation

In 1988 this Committee directed that "the regulations regarding contracts under the Indian Self-Determination Act should be relatively simple, straight-forward, and free of unnecessary requirements [or] procedures." S. Rep. No. 100-274 at 38. Instead, what has emerged from nearly five years of agency deliberations is a 400-page document that seeks to control virtually every aspect of the "638" contracting process. It is, indeed, an ironic development. In 1988 Congress moved aggressively to liberalize the "638" contracting

process in favor of tribes. In response, and with the opportunity to write new regulations, both Departments have done their level best to produce regulations which restrict and impede contracting. It is not an exaggeration to say they have defied the will of Congress.

The enclosed Report details the many deficiencies which permeate the January 1993 draft regulation, undercutting Congress' goal of promoting maximum self-determination. As explained at length therein, the January 1993 draft unlawfully or improperly:

- removes huge portions of the Departments' Indian programs and functions from the reach of the statute (the "contractibility" issue), both insulating the bureaucracy and driving up tribal needs for contract support costs.

- removes departmental decisions regarding how contractors are funded from the statutory "declination" procedure and from any meaningful appeal process.

- permits the Departments to decline contract proposals which meet the statutory criteria if the Departments anticipate an adverse effect on the Government's services to non-contracting tribes.

- applies the federal procurement system to the BIA roads program, to cadastral survey programs, and to the Housing Improvement Act program.

- prohibits implementation of local tribal member employment preference ordinances.

- removes contractor flexibility to redesign programs, by imposing upon tribal contractors all the same program standards and requirements which dictate how the agencies operate.

- establishes an inadequate means of reporting to Congress shortfalls in indirect costs and contract support costs.

- denies tribal contractors mandatory access to the same GSA sources of supply (including negotiated airfares) which the agencies are able to access in their direct operation of programs.

- imposes excessive "acquisition" and "procurement" requirements on tribal contractors engaged in construction activities.

- impedes immediate transfer to tribal contractors of federally-owned property used in a contract, even though the regulations do permit tribal contractors to take title to new property purchased with contract funds.

- impedes the full distribution to tribes of savings realized by the agencies as their programs are transferred to tribal operation.

- continues the policy of not covering all indirect cost shortfalls, including shortfalls caused by the failure of other departmental agencies to pay their full shares of such costs.

- establishes in the Departments the power to unilaterally suspend a contract or withhold contract funds entirely outside the procedural protections of the statutory "reassumption" process.

These, together with scores of other deficiencies, are detailed in the enclosed report.

The balance of my testimony will be devoted to focussing on four of the key areas of concern which have emerged in the draft regulations. My colleagues and I on this panel have agreed to divide up the topics. I will discuss the issues of contractibility (what programs and functions may be contracted), divisibility (how programs are divided), indirect cost and contract support cost shortfalls, and the suspension of contracts or contract payments. Mr. Dean will then address issues of contract funding, the declination process, agency appeals, program standards and financial management issues. Finally, Mr. Clapham will address issues of tribal employment preference, the trust responsibility, and certain construction and federal acquisition regulation issues.

Contractibility. We begin with the issue of "contractibility," because no other place in the draft regulations so clearly demonstrates the marked and very active resistance of both Departments to the mandate of the Act -- notwithstanding the 1988 Amendments. The Committee will recall its directive

> [T]hat the Secretary is not to consider any program or portion thereof to be exempt from self-determination contracts. Tribes have the right to contract from BIA Agency functions, IHS Service Unit functions, and BIA and IHS Area Office functions, including program planning and statistical analysis, technical assistance, administrative support, financial management including third party health benefits billing, clinical support, training, contract health services administration, and other program and administrative functions.
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> The intent of the Committee is that administrative functions of the Indian Health Service are contractible under the Indian Self-Determination Act.
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> • • •
>
> Section 102 as amended further authorizes tribes to contract with the Secretary to operate any program, or any portion of any program, without regard to the organizational level that such program is operated within the Department of the Interior or the Department of Health and Human Services. Again, this emphasizes the intent that tribes are authorized to contract with the Secretary to operate headquarters, area office, field office, agency and service unit functions, programs or portions of programs.

S. Rep. No. 100-274 at 23-24.

In marked contrast to the statute and to the explanatory Committee report, the regulation in Section 900.102 defines the term "program" and the concept of "contractibility"

-- that is, what programs are contractible under the Act -- so narrowly as to theoretically insulate all higher level departmental functions from the Act. Thus, the term "program" is defined to mean "the operation of services," while Section 900.106(c) restricts contracting to "service delivery programs" "generally performed at the reservation level...." By these terms, area office, headquarters and even supportive field activities are theoretically rendered virtually exempt from the mandate of the law.[2]

To further support this restrictive view of the Act, the draft regulation in preamble peculiarly argues that any broader contracting of departmental functions would violate the Appointments Clause of Article II of the Constitution. The draft regulation at Section 900.106(d) goes on to exempt from contracting any "inherently Federal responsibilities involving the exercise of significant authority under the Constitution, and functions integral to the exercise of discretion, judgment, or oversight vested in the Secretary by law or by virtue of the Secretary's trust responsibilities." To a similar effect is subsection (e).

These provisions, if applied by their literal terms to all activities of the Department of the Interior and the Indian Health Service, would bar virtually all of the contracting which has taken place since the original 1975 Act was signed into law. These provisions are all the

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[2] The draft regulation invokes the federal government's "trust responsibility" as a barrier to contracting, in direct defiance of the 1988 Amendments. *See* S. Rep. No. 100-274 at 2644. If, indeed, no aspect of the federal government's trust responsibility could be contracted under the Act, there would be nothing left of federal Indian programs to contract at all. Thus, by invoking the shield of "trust responsibility" the Secretaries' seek to reserve to themselves the sole and virtually unreviewable authority to determine whether or not to approve contracts under the Act.

more curious when they come from Departments which have simultaneously been mandated, under Title III of the Act, to simplify contracting even further through the execution of self-governance compacts. Recall that the Title III self-governance demonstration project does not expand the scope of what is contractible, but only the discretion which compacting tribes enjoy in reallocating funds within a consolidated funding agreement.

A more detailed analysis of the contractibility section is contained on pages 6-8 of our enclosed report. The Departments' approach to what is "contractible" under the Act is more than a matter of mere philosophical quibbling. As a practical matter, such language will provide the agencies with an opportunity to insulate the bulk of their higher level operations from "638" contracting. Even at the "services" level the Departments will have the ability to invoke section 900.106 to assert the power to refuse contracts. And, perhaps most importantly, the Departments' approach will insulate from contracting all of the diverse administrative functions which support the delivery of services in the field, resulting in a concomitant substantial increase in the need for additional contract support cost funding from Congress.

That is, if warehouse, personnel, or financial management functions supporting a field operation are not contractible, funds representing those supportive functions will be retained by the agencies and will not be included in the Section 106(a)(1) contract amount, leading to a higher tribal need for contract support costs to perform these functions. It is precisely this sort of approach to contracting which over the past 18 years has led to the maintenance

of an ever-growing agency bureaucracy, even as the contracting process has taken over even larger shares of the Departments' Indian budgets.

Divisibility (or Program Division) As with the issue of contractibility, prior to the 1988 Amendments neither Department ever identified the need to raise this potential impediment to 638 contracting. Now, with the opportunity to draft new regulations in the face of reform legislation, the agencies have found yet another way to undercut those reforms and deny tribes their statutory right to contract.

Section 102 of the Indian Self-Determination Act states clearly that the Secretary may only decline a contract if the tribal organization's proposal is deficient in one of three respects -- either the tribal organization cannot ensure the adequate protection of trust resources, the services to be provided by the tribal organization will not be satisfactory, or the tribal organization has not established that it can "properly complete and maintain" a proposed contract. Nowhere do these three "declination" criteria refer to the effect which a tribal organization's contract proposal would have on other tribes which are not parties to the contract. Indeed, the only place in which the Self-Determination Act refers to such non-contracting tribes is in Section 106(b), providing that the Secretary is not required to reduce funding to non-contracting tribes in order to fund a contracting tribe's proposal. (Similarly, *see* Section 307 of Title III.)

Consistent with this interpretation of the Act, prior to 1988 neither Department ever suggested that the effect a contract would have on a neighboring non-contracting tribe could form the basis for refusing the contracting tribe's demand to operate its own programs in the interest of promoting tribal self-determination. Indeed, the Bureau of Indian Affairs continues to adhere to this view -- that a "declination" finding cannot be based upon such an adverse effect; rather, the Bureau agrees with tribes that it is incumbent upon the Bureau, not the contracting tribe, to make such arrangements as may be necessary to assure that no such adverse effects occur. (This, of course, is precisely what the Bureau currently does in the Title III self-governance project.) But all other agencies of the Department of Interior, together with the Department of Health and Human Services, continue to insist that such an effect can be a basis for declining a contract.

Here, again, the problem is a practical one. Up until the 1988 Amendments, the two agencies have frequently seen their programs divided up by the various tribes situated in multi-tribal agencies and multi-tribal service units. Operating under the assumption that each such tribe was entitled to a contract, the agencies always found a way to award the contract while also protecting the interests of non-contracting tribes. Now, the agencies would open the door to refusing contracts altogether, establishing an all or nothing approach in which a such tribe could never secure a contract under the Act except as part of a inter-tribal consortium embracing all tribes.

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Certainly non-contracting tribes should be able to invoke Section 110 remedies to compel the Secretary not to reduce funding to such tribes. But the Secretary should not be able to use the threat of such an effect to refuse a contract.

Again, in the Title III self-governance compacting process procedures have been established by the Department of the Interior to protect the interests of non-compacting tribes (such as though the setting aside of "residuals" and the securing of "shortfall" funding). There is no reason in logic, nor any basis in the Act, for either Department to take a contrary position when it comes to contracting under Title II.

Indirect Costs and Contract Support Costs. In developing the 1988 amendments this Committee noted that:

> Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts.

S. Rep. No. 100-274 at 8. The Report went on to explain the vital need of tribes for indirect costs to fund the administrative support essential to the effective operation of tribally-contracted federal programs. The Committee observed that typically federal agencies do not include in "638" contracts the agencies' own administrative overhead funding, and that without the mechanism of indirect costs and contract support costs, tribes with no other source of funding are compelled to curtail their programs in order to meet their administrative responsibilities.

Congress very deliberately intended to correct this problem -- and to eliminate the Hobson's choices facing tribes every day in either laying off a nurse or failing to prepare the statutorily required single agency annual audit, of cutting back dental services or failing to carry adequate insurance, of restricting clinic hours or providing for the training and continuing educational needs of program staff.

Congress addressed this issue in Section 106(a)(2) of the Act, by mandating that the Secretary add to the direct program funding amount such "contract support costs" as are necessary to prudently manage the contracted program. Similarly, in Section 106(g) Congress directed that indirect costs be added to the direct funding base in order to arrive at a total contract funding amount.

As you have heard today from other witnesses, both lead agencies -- the Bureau of Indian Affairs and the Indian Health Service -- have repeatedly failed to report to you the shortfalls they have experienced in funding indirect costs and contract support costs for tribal contractors. This is but a repetition of the several years of reporting failures noted by this Committee on page 9 of its 1988 report. By keeping Congress in the dark, tribes continue to be left holding the bag while the agencies go scot free.

It is not merely the agencies' failure to report their own shortfalls which has generated problems in recent years. Congress also directed that IHS and BIA report to you on the shortfalls which result from the failure of other federal agencies to contribute their

fair shares of indirect costs to those tribal contractors which deal with several different agencies. For instance, if a tribal contractor has a 20% indirect cost rate, but the U.S. Department of Housing and Urban Development only pays 15%, the 5% shortfall must be addressed. Congress must hear this information and tribes must not be shorted. The mechanism which Congress put into place in Section 106(d) to prevent government negotiators from penalizing tribal contractors in these situations has not worked well. But to make matters even worse, IHS and BIA refuse to acknowledge their obligation under the law to tell you of these funding shortfalls. Once again, the victims are the tribes and the Indian people they serve. Perhaps if the Departments could not seek to hide behind the Act's "subject to the availability of appropriations" language, they would be motivated to report these shortfalls more promptly and more accurately.

The failure of the agencies in dealing properly with indirect costs has caused most tribal contractors to continue diverting program funds in order to shore up their contract support cost needs. One tribe, joined by several others as *amici curiae*, is now in litigation against the Secretary in the federal court in New Mexico. Four other tribal contractors we represent are preparing Contract Disputes Act Claims or district court litigation to seek to recover their shortfall amounts. As tribes see it, to the extent the agencies defend that they cannot pay what has not been appropriated, the agencies only have themselves to blame for failing to report the shortfalls to Congress.

Contract Suspension and Payment Suspension. The last topic I will cover concerns the purported new authority now being advanced by the two Departments to suspend contracts and to suspend contract payments in a process entirely outside the "reassumption" process established under Section 109 of the Act.

Along with the authority to administer federal Indian programs under a "638" contract comes responsibility and accountability, both to the people being served and to the Government agencies. Congress carefully addressed the issue of accountability by mandating the preparation of annual audit reports pursuant to the Single Agency Audit Act. And, in instances of "gross mismanagement", Congress authorized the agencies to step in and involuntarily "reassume" operation of contracted programs from a tribe. In doing so, Congress carefully provided for due process, notice and an opportunity for a hearing. Congress could have, but chose not to, permit the agencies to intervene more actively in the administration of tribal programs. Instead, and as noted on page 21 of the Senate Report, it determined that "the Federal Government should not intervene into the affairs of ... tribal governments except in instances where civil rights have been violated, or gross negligence or mismanagement of federal funds is indicated, as provided in Section 109 of the Act."

In defiance of this carefully crafted scheme, in Section 900.307 of the draft regulations the Departments now assert the new power to immediately suspend a contract upon the curiously vague basis that "the contractor's continued performance would impair the Secretary's ability to discharge his trust responsibility." Similarly, in Section 900.408(e) the

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Departments assert the authority to withhold contract funds from tribal contractors in the event the contractor in any way "fails to comply with the terms of the contract including the provisions of these regulations." Here, again, the agencies seek to take control and micro-manage contractors in a manner never envisioned by Congress in 1975, and in a manner deliberately rejected by Congress in 1988.

Our additional concerns regarding the draft regulations are set forth in the attached March 31, 1993 report including a number of key issues which will be elaborated upon further by Mr. Dean and Mr. Clapham.

4. The need for further statutory reform

Due to the painfully slow process for developing regulations, and the increasingly hostile nature of each succeeding draft regulation, three years ago a tribal grassroots effort was initiated to develop a package of comprehensive amendments to the Indian Self-Determination Act. Through these amendments the objective was to secure in statute what could not be secured in regulation, and to put into place many of the concrete improvements which tribes had hoped for as a result of the 1988 Amendments.

A few of these technical amendments were adopted by the Committee in 1990, with the balance left for further consideration as the regulatory process continued. Sadly, history now shows that process is not likely to end soon nor to conclude in a manner which will be

favorable to the interests of tribal contractors. Accordingly, in very close consultation with tribes, tribal organizations, Area tribal boards, national tribal interests and tribal attorneys situated throughout the country, a package of comprehensive statutory amendments has been developed.

A set of the amendments and an accompanying explanation is enclosed with my testimony. For the most part these amendments have not changed over the past three years, and they have been widely endorsed by such entities as the National Congress of American Indians, the National Tribal Leaders Forum, the National Tribal Coordinating Committee the National Indian Health Board, virtually every Area board from the United South and Eastern Tribes to the Alaska Native Health Board, and countless tribes and tribal organizations throughout the country.

We ask that the Committee give close consideration to prompt enactment of a bill to put these 28 amendments into law. We also ask that the Committee give consideration to additional measures which might be taken to assure that the Departments change course and embrace, rather than resist, the Indian Self-Determination Act.

Thank you Mr. Chairman for inviting me to testify before your Committee on issues relating to implementation of the Indian Self-Determination Act Amendments of 1988. We stand ready to assist your Committee in whatever way you feel would be appropriate.

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REPORT ON THE DEPARTMENT OF THE INTERIOR'S AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' JOINT DRAFT JANUARY 1993 REGULATION TO IMPLEMENT THE INDIAN SELF-DETERMINATION ACT AMENDMENTS OF 1988 AND 1990

REPORT ON THE DEPARTMENT OF THE INTERIOR'S AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' JOINT DRAFT JANUARY 1993 REGULATION TO IMPLEMENT THE INDIAN SELF-DETERMINATION ACT AMENDMENTS OF 1988 AND 1990

I

INTRODUCTION

This Report highlights those areas of most concern to Tribes in the proposed draft Indian Self-Determination Act regulation released by the Department of Health and Human Services and the Department of the Interior during the closing days of the Bush Administration.

As of the date of this Report, it is unknown whether the Clinton Administration will move forward with publication in the *Federal Register* of the proposed regulation in its current form or will instead substantively review and revise the document before publication. In either event, it is clear that while the draft document has been substantially improved from the 1991 draft in terms of format, organization, style, and in many instances content, the draft remains woefully deficient in a number of very key areas critical to the "638" contracting process. As such, Tribes are likely both to urge the Departments to make substantial changes in the final regulation, and to urge Congress to consider further statutory amendments to the Act.

This Report generally tracks the various subparts established in the draft regulation, beginning with the preliminary sections and continuing from Subpart A through Subpart P. Since we have endeavored to keep this Report to a relatively-manageable size given the enormity of the regulation -- 392 pages -- this Report is not exhaustive of all issues of concern identified in the draft. Rather, we have focused our remarks on the issues of greatest concern to Tribes and tribal organizations. In doing so, we have also provided both section numbers and page numbers to assist you in following these comments along with your own copy of the draft regulation. (Please let us know if you do not presently have a copy of the draft and we will see that one is sent to you immediately.)

II

PRELIMINARY SECTIONS PRECEDING THE ACTUAL DRAFT REGULATION

As you will see in reviewing the draft, the actual proposed regulation does not begin until page 59. The first 58 pages set forth basic information regarding the regulatory process, describe the history of the development of the regulations (Draft at 4-8), and

generally summarize key aspects of the regulation (Draft at 8-55). We discuss each of these segments of the introductory remarks separately.

One-paragraph Summary (Draft at 1). This three-sentence summary of the regulation contains a substantial omission in failing to acknowledge the Indian Self-Determination and Education Assistance Act Amendments of 1990, enacted in specific response to early problems in the regulation development process. Despite the Departments' opposition at the time to the proposed amendments, plainly the new regulations must be in compliance with those amendments, as reflected later on page 3.

Comment Period (Draft at 1-2). The draft proposes a relatively long 120-day formal public comment period after publication of the draft in the *Federal Register*. We agree that a lengthy comment period is necessary for all interested Tribes and tribal organizations to fully analyze the proposed regulation and to develop comments and recommendations for charges.

Of equal interest is the Departments' adherence to their commitment (made in late 1991) to hold a single, national meeting as part of the formal notice and comment process. Tribal leaders have consistently demanded that there be such a meeting, in order to directly pose their comments, concerns and suggestions to the regulation drafters in a form which permits Tribes to share one another's views and explore areas of agreement and consensus.

Public Participation in Pre-Rulemaking Activity (Draft at 4-8). In this section the Departments generally review the significant events which have occurred since the 1988 Amendments were originally enacted by Congress.

Although there was extensive consultation between the two Departments and the Native American tribal community during the first two years following enactment of the Amendments, this section fails to point out that much of the consultation process occurred only after persistent, strident and very vigorous demands by tribal leaders and congressional staff, and over the strong resistance of many departmental representatives.

The section notes the lengthy periods of delay which transpired in the course of developing the draft regulations, including almost two and one-half years from the last meeting of the Tribal-Federal Coordinating Work Group in 1990. It is unfortunate, in light of the lengthy agency delays which accompanied development of the draft, that on page eight the Departments attribute some of the regulatory delays to "the requirement for tribal participation." More accurately, tribal leadership aggressively sought to compel the Departments to develop their regulations within the original ten-month time period mandated by Congress in the 1988 Amendments. Despite calls for faster action, the first regulation

drafting workshop convened by BIA and IHS did not occur until four months after the law had been passed. Moreover, not until two years later did the Secretary of the Interior finally acknowledge that the Indian Self-Determination Act applied to all agencies of the Department, and not merely to the Bureau of Indian Affairs. Consistently, it has been the lack of an aggressive policy to promptly implement the Act and to put new regulations in place, not the time needed for tribal participation, which has been responsible for what will ultimately be over five years of delay from the deadlines originally fixed by Congress.

Summary of Major Issues (Draft at 8-55). This section summarizes and explains many of the key decisions made by the Departments in the course of drafting the regulations. The Summary is therefore a good starting point for understanding how the two Departments arrived at the decisions they made. For instance, the language chosen in the section dealing with the contractibility of departmental programs is readily understood from the Departments' explanation that they chose to limit the mandate of the Act to "service delivery programs" and the "operation of service programs." (*Id.* at 8-9) Similarly, the Departments' view that "what Congress intended by the term 'program' was the operation of services" (*id.* at 11), reflects a very narrow prospective which explains the equally narrow and parsimonious approach taken by the regulations to the scope of contracting available under the Act.

The "Summary" section briefly discusses such vital issues as contractibility and the related definition of what is a "program" (*id* at 10-17), divisibility (or "program division") (*id.* at 17-18), contract funding issues (*id.* at 19-21), appeals on funding determinations (*id.* at 21-22), Indian preference in hiring and training (*id.* at 22-23) (all in Subpart A), and a relatively brief description of the remaining fifteen Subparts (*id.* at 24-55). Although the Summary is helpful, it is certainly not a substitute for directly examining the regulation language, particularly since in many instances the Summary mischaracterizes the effect of various sections while ignoring major implications of other sections.

We next turn to a discussion of each Subpart.

III

SUBPART A -- GENERAL

At nearly fifty pages long (*id.* at 63-112), Subpart A contains most of the key provisions of the entire draft regulation. This Subpart therefore merits particularly close scrutiny. Below we highlight the more significant Tribal concerns identified in Subpart A.

Section 900.102 -- Definitions.

During the March 9-10 consultation meetings, DOI representatives confirmed that the Housing Improvement Program (HIP) and the BIA Roads Maintenance Program will not be considered "construction" programs subject to the special Federal Acquisition Regulations (FARs) elaborated upon at length in Subpart J. If so, this would represent a favorable shift from current BIA policy. However, the definition of the term "construction" fails to exclude these two important programs. (Draft at 66) Moreover, the regulations do not exclude these programs in Subpart J or anywhere else.

In an important improvement from earlier drafts, IHS has agreed that contract appeals will be referred to the Interior Board of Contract Appeals, rather than to the Armed Services Board of Contract Appeals. This change is reflected in the definition of "contract appeals board."

"Indian-owned economic enterprises" are improperly defined to exclude tribally-owned enterprises.

The term "program" is defined in an exceedingly restrictive manner so that it is limited to "the operation of services". As such, the definition is not supported by a plain reading of the statute, and is contrary to the broad intent regarding contractibility expressed in the report of the Senate Select Committee on Indian Affairs which accompanied the 1988 Amendments. As a consequence, if finalized without change, the proposed amendment is certain to leave in place virtually all Area Office functions (and, of course, Headquarters functions), leading only to contracting of agency field functions and locations. Since enormous program support occurs at the Area level, such an interpretation of the Act will also lead to a tremendously-increased need for contract support costs to cover contractible functions which the Departments refuse to turn over to tribal operation.

For instance, to the extent Area-based personnel functions are kept out of the contracting process, Area personnel offices will remain intact even though all field operations served by Area personnel have been turned over to tribal operation. Tribal contractors will then be left to seek additional contract support funding to finance their own personnel systems. This is precisely the kind of restrictive view of the 1975 Act which Congress deliberately sought to overcome in the 1988 and 1990 Amendments. Finally, the term program restrictively excludes programs benefitting a "Tribe", as distinguished from its members.

The definition of "real property" is misworded in such a fashion as to include ordinary leases, making leases subject to the same restrictions as are applicable to real estate.

Section 900.103 – Policy Statement (Draft at 73–77). The draft regulations set forth as a Secretarial policy statement a commitment to promote tribal contractor flexibility and the discretion "necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, social, religious and institutional needs." (*Id.* at 75) In fact, however, the program standards set forth by both Departments in Subparts N and O virtually preclude the possibility of any meaningful flexibility in the implementation of contracted programs. Although the policy is thus sound, it is certainly not reflected in the balance of the regulations.

In subsection (b)(4) (*id.* at 75) the Secretary characterizes one of his residual roles in the contracting process as assuring "that a process exists to adjudicate complaints under the contract." As explained by the Departments' representatives in March 1993 meetings, through this language (and other language elsewhere in the regulations) the Secretary presently intends to be the arbiter of disputes, complaints or grievances which may be brought against a tribal contractor by a third party such as a beneficiary, a disappointed subcontract bidder, etc. This represents a substantial departure from current practice, and would force an incursion by the Secretary directly into the internal affairs of Tribes and tribal organizations. Moreover, such an incursion into tribal sovereignty would run directly contrary to a recent decision of the Interior Board of Indian Appeals in a complaint filed against the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana.

In subsection (b)(6) (*id.* at 76) the Departments apparently intend, but fail to state, that the Secretary is committed to maintaining budgetary consultation in the federal budget process relating to activities which are *authorized* to be contracted under the Act, and not merely programs actually under contract.

The policy on savings in Secretarial operations (resulting from the contracting of programs to Tribes) set forth in subsection (b)(7) (*id.* at 76) fails to include the key principle of equitable treatment. That is, the regulation, as presently drafted, would permit the Secretary to take all savings to supplement and boost only Secretarial–operated programs, to the relative harm of tribally–operated programs. The officials in attendance at the March consultation meeting acknowledged that the last sentence regarding "noncontracted programs" was improperly retained from earlier versions of this section and should be deleted, but remained noncommital with respect to the principal of mandating equitable treatment.

Subsection (b)(7) speaks glowingly of the Secretary's commitment to "extending the applicability of this [self–determination] policy to all operational components within the Department." (*Id.* at 77) But in fact, this strong policy statement is directly contradicted by the regulations' very restrictive definition of the term "program" and the related provisions in Subpart A regarding "contractibility".

Section 900.106 - Contractibility (Draft at 79-88). In a long, rambling and ill-organized section the Departments go at great length to define portions of programs, departmental functions and various activities which, in the opinion of the Departments, are not subject to the contracting mandate of the Indian Self-Determination Act. The net effect is a severe restriction on the scope of contracting under the Act.

Subsection (a) begins by repeating the statute, but then adds a new section originally developed by the Department of the Interior, to guide the determination of when a program is "for the benefit of Indians." This section correctly observes that a program is for the benefit of Indians when the regulations governing the program, or their administration by an agency, reflect a departmental intent to benefit Indians as primary or significant recipients. Inconsistently, however, in subsection (a)(2) the regulation calls for a program to be authorized by Congress and be funded by Congress to be contracted, notwithstanding that the Departments may have otherwise reprogrammed funds to operate the program in issue. (*Id.* at 80)

Of greater moment, in subsection (c), the regulation goes at great lengths to emphasize the philosophy of the Departments that only "service delivery programs" are subject to contracting under the Act -- being programs which are "generally performed at the reservation level. . . ." (*Id.* at 81) Again, this represents a severe restriction from the full scope of the Act, contrary to congressional intent.

To make matters even more restrictive, at the end of subsection (c) the Departments propose that a contract may not impair the Secretary's "obligation under the Constitution to ensure the laws are faithfully executed." In the earlier Summary section, the Departments expound upon this concept by explaining their view that if a function involves "the exercise of significant authority pursuant to the laws of the United States", under the Constitution the function may only be exercised by officers of the United States appointed pursuant to the Appointments Clause of Article II. The Departments' reliance on case law regarding the Appointments Clause is directly contradicted by *Mazuri* and other Indian law cases decided by the Supreme Court which specifically endorse the ability of Congress -- as it has done in the Indian Self-Determination Act -- to delegate federal authority to tribal governments. Indeed, were it otherwise virtually no program could be contracted under the Indian Self-Determination Act.

Subsection (d) elaborates upon this restrictive view of the Act by somewhat mysteriously prohibiting the contracting of any "inherently federal responsibilities involving the exercise of significant authority under the Constitution, and functions integral to the exercise of discretion, judgment, or oversight vested in the Secretary by law or by virtue of the Secretary's trust responsibilities." (*Id.* at 82) The quoted language, of course, aptly describes everything the Secretary of Health and Human Services and the Secretary of the

Interior do in the arena of Indian affairs. The examples which follow in subsection (d) make it clear that the very types of activities which the Secretaries claim in the regulations are not contractible are, in fact, being contracted today.

For instance, the operation of a $25 million hospital plainly involves countless acts of discretion and judgment, involves the administration of a trust program (the provision of health care to Native Americans), naturally involves the expenditure of federal funds under the contract, and involves the direction and control of federal employees (when federal employees are assigned or detailed to a tribal contractor). As such, the supposed standard for withholding programs from the contracting mandate of the Act is no standard at all, and will provide absolutely no coherent guidance to agency officials charged with determining whether or not to approve or decline contract proposals.

Subsection (e) (*id.* at 84) in very repetitive language again emphasizes the Secretary's view that if a program involves discretionary decisions or "the making of value judgments" it is not contractible. Such a restriction is plainly absurd. Clearly, over the course of two and one-half years the Departments have endeavored to draw an ever-larger circle around their functions in order to protect those functions from contracting. The language now chosen has become so broad that it could by its very terms comfortably be applied to bar every Indian Self-Determination Act contract which has ever been awarded under the Act.

Subsection (g) (*id* at 84) is somewhat of a *non sequitur*. This subsection speaks not to the contractibility of a program, but to the appropriateness of a particular Tribe seeking to contract for the operation of a particular program. Agency officials explain that the section was prompted by efforts of one Tribe to operate programs six hundred miles away benefitting a different Tribe, leading to the concept that a Tribe must benefit from the services it proposes to contract. While the approach taken in subsection (g) is generally not objectionable, by overstating the "geographic" criteria for determining whether or not a Tribe may appropriately seek to operate a program, the section may also bar a Tribe from contracting for the operation of an Area Office function -- since an Area Office is typically in an urban center, rather than in a Tribe's "geographic service area". (*See id.* at 86) Such a restriction is, of course, consistent with the Departments' extremely narrow view of the programs which are eligible for contracting under the Act.

Finally, in subsection (h) (*id.* at 80) the Secretary would adopt a policy of not entering into a contract if the underlying activity "cannot be contracted before completing an environmental impact statement" or similar agency review. But the award of a contract under the Indian Self-Determination Act is not itself a "major federal action" which triggers the National Environmental Policy Act or similar environmental laws. On this point, agency officials at the March 1993 meetings agreed, and also agreed that an activity could be

contracted under the Act even though the action itself -- say, the construction of a new highway -- might be subject to the requirements of NEPA, the Endangered Species Act, or similar legislation. There is nothing in the Indian Self-Determination Act which suggests that the Secretary may hold back a program from the contracting mandate of the Act merely because there are other federal statutes which must be complied with before the particular activity involved in the program may be undertaken. Nonetheless, this is precisely what the Secretary proposes in subsection (h).

Section 900.107 - Program Division (or Divisibility) (Draft at 88-92). This section addresses another key issue which has been vigorously debated over the years. The "program division" issue arises when a tribal contracting proposal does not propose to carry out a program in its entirety, but only a piece of a program; the issue of "program division" arises because the balance of the program must then be operated by the agency for the balance of the program's beneficiaries.

Subsection (a) (*id.* at 89) is technically deficient in misstating the full scope of the divisibility issue, and erroneously confuses who may be a party to a contract, and operate a program, with who is served by a contract.

Subsection (c) (*id.* at 90) suggests, incorrectly, that the Secretary has the option of taking savings away from a tribal contractor and plowing those savings into programs benefitting other Tribes experiencing adverse effects due to the division of a program. The reference to savings should be corrected to refer to savings *within the Department* (not savings within a "contracting organization"). Further, the permissive language in this section (*id.* at 90) should be made mandatory.

Subsection (d) (*id.* at 90-91) contains the most hostile provision of this section, authorizing the Secretary to refuse a Tribe's contract proposal based upon the effect the contract would have on the Secretary's ability to continue serving other Tribes not involved in the contract proposal. It is significant that, on this issue, **the Bureau of Indian Affairs takes a radically different position from the position espoused by IHS and the other DOI agencies. Here, BIA agrees the Act does *not* authorize the Secretary to consider the effect that approving a contract proposal would have on noncontracted services benefitting other Tribes.** Indeed, the Bureau representatives reported that the Assistant Secretary is prepared to permanently waive, by *Federal Register* notice, the policy stated in subsection (d). The Assistant Secretary's agreement (and the agreement of his attorneys in the Associate Solicitor's Office) with the position taken by tribal representatives severely undercuts the legal basis for the contrary position set forth in subsection (d). Clearly in the absence of a reversal by the new Administration or legislative reform, none of the agencies other than BIA is prepared to comply with the law.

In sum, while the "program division" procedures set forth in Section 900.107 are helpful in sorting through the contracting process, the section contains key features which are hostile to the mandate of the Act to facilitate and maximize tribal self-determination.

Section 900.108 - Amount of Funding (Draft at 92-98). Like the "contractibility and program division" sections, the "amount of funding" section contains a number of provisions which undercut the ability of Tribes to effectively contract for the operation of programs under the Act.

Subsection (a) is poorly drafted and effectively reverses the manner in which contracts are funded under the Act. Under the Act (specifically, Section 106(a)(1) and (2)), a Tribe is to receive all of the funds and resources which the Secretary has at his or her disposal in the direct operation of the program. Only to the extent such funds are insufficient to fully administer the program, is an additional category of funds (known as "contract support costs") to be added to the contract.

Contrary to the statute, the draft regulation describes the funding mechanism in such a way that the Secretary is not required to turn over all funds which directly support a program. Rather, the Secretary can withhold a portion of such funds and require the contractor to secure the balance as "contract support cost" funding. This scheme allows the Secretary to retain substantial funds (and the associated agency bureaucracy) which support a contracted program, producing a funding shortfall which the tribal contractor must make up out of available contract support costs. If, as is typically the case, Congress does not appropriate the full amount of funds needed for contract support costs, the contractor is shorted while the government is unjustly enriched. As in other areas, this is precisely the type of manipulation of contract funding which Congress sought to correct in the 1988 Amendments.

To make matters worse, the regulations entitle the tribal contractor not to its full contract support costs, but only to such contract support costs as the Secretary chooses to allocate to the contractor from available appropriations. In effect, then, a tribal contractor is only entitled to the funds which the Secretary chooses to provide the Tribe; this totally defeats the mandate of the Act to require full funding of contracts, even if full funding requires the Secretary to report shortfalls to Congress followed by appropriation relief.

Subsection (b) (*id.* at 93-95) explains the types of contract support costs which may be awarded, and reinforces the problem in substituting contract support costs for direct Secretarial costs. For instance, much of the executive direction, financial management and personnel management functions identified as contract support costs activities are, in fact, available directly from the Secretary. In such situations, the Secretary should be required to turn over his or her financial management and personnel management resources to the tribal contractor. But instead under the proposed regulations the Secretary would retain all such

financial and personnel management resources, requiring the Tribe to secure equivalent resources from such funds as may have been appropriated by Congress for contract support costs.

On at least three occasions, including subsection (d)(1) and (g) (*id.* at 96), the draft repeats the statutory provision that the Secretary is not required to reduce funding for one Tribe in order to make funds available to another Tribe. While an easy matter for editorial review, the heavy emphasis on this point echoes the recurring theme in Subpart A of identifying all possible ways in which the funding of contracts may be restricted by the Secretary.

The issue of savings is addressed in subsection (d)(2). (*Id.* at 96; *see also* Secretary Policy Statement Report at 76) Of greatest concern here is that, again, the duty to provide savings to tribal contractors on an equitable basis is discretionary, rather than mandatory. Thus, the Secretary is free to retain all savings to boost his or her own programs at the relative expense of tribally-operated programs.

Subsection (f) (*id.* at 96) establishes a troubling presumption that Congress, when it appropriates funds for the specific benefit of a particular Tribe, intends to include contract support costs in that amount in the event the Tribe operates the funded program under a "638" contract. Presently this is the system employed by the Indian Health Service, though not the Bureau of Indian Affairs. That is, IHS separates contract support costs off the top of a program, and awards the Tribe the full appropriated amount in two pieces. In this manner, the funds Congress intended for the direct provision of a particular program are actually reduced in order to fund administrative cost needs. The BIA, on the other hand, adds the congressional sum to the direct funding base against which indirect costs are calculated, leading to a higher indirect-cost need which can then be funded from available appropriations.

The IHS approach is particularly peculiar, since if a tribally-earmarked program is not operated under a 638 contract, the program is administered by the Secretary with the full benefit of all the Secretary's other resources. The Secretary is not required to fully support the program strictly from the earmarked appropriation to secure financial management support, personnel management support, and so forth. Yet the regulation imposes this restriction on Tribes. To deny Tribes either a direct Secretarial amount for these functions, or contract support cost funding to pay for these functions, is directly contrary to the statute and discriminates against self-determination contracting.

Section 900.109 - Funding and/or Contractibility Impasses (Draft at 98). In an important reversal, the Departments have now agreed to insert a provision permitting tribal contractors to carry out portions of their contract proposals at funding levels lower than

requested, while simultaneously pursuing appeals. Unfortunately, subsection (b)(1) is drafted in a way which permits the Secretary to refuse to agree to a Tribe's operation of a reduced scope of work at a reduced funding amount. Whether to go forward with a reduced scope of work or a lower funding amount should be entirely up to the Tribe, not the Secretary, since in such circumstances the Secretary has already made his or her determination that a portion of the contract may be awarded at a lower funding level.

Subsection (c) is addressed to situations where the Tribe and the Secretary disagree on the funding level for the subsequent year of an ongoing contracted program. In yet another indication of a hostile attitude to fully funding contracts, this section would require a tribal contractor to accept the same funding level as in a prior year, notwithstanding that Congress may have appropriated Pay Act and other increases which under the Act the Secretary is required to pass on to the contractor. Subsection (c) should therefore be revised to require that the subsequent year of a contract be funded at no less than the level which the Secretary would have to directly operate the program, rather than being limited to the funding level of the previous year.

Section 900.110 – Limitation of Funds (Draft at 98–100). In subsection (a), the draft improperly takes account of carryover funds from previous budget periods in assessing the adequacy of contract funding. This directly contradicts current law, and is further contradicted by the correct language set forth in the next section, Section 900.111(b).

Sections 900.113 – Funding Reduction; Section 900.114 – Increase to Contracts (Draft at 101–103). Section 900.113 would permit contract funding amounts to be reduced in the event there is either a reduced need for flow–through funds, or a decrease in a Tribe's indirect–cost rate. Tellingly, however, no comparable provisions are included in 900.114, dealing with contract increases. That is, there is no provision for increasing contract funding levels in the event there is a greater need for flow–through funds or a higher indirect–cost rate.

Further, 900.114 is deficient in failing to specify explicitly that general program increases, together with such increases as mandatory Pay Act increases, are to be fully shared on an equitable basis with tribal–operated programs. Similarly, this section fails to state that year–end funds available to the Secretary will be disbursed on an equitable basis to tribally–operated programs. Again, the extensive care with which the regulations specify how contract funding can be reduced, as compared to three lines of text addressing contract increases, reflects the generally hostile tenor of these provisions.

Section 900.115 – Indian Preference (Draft at 103). As you know, Section 7(b) of the Act generally addresses the requirement that tribal contractors carry out policies of Indian preference in employment and training. Existing regulations reflect the policy that the determination of how the Indian preference mandate of the Act should be implemented is a

matter for tribal discretion. Under the existing regulations, Tribes and tribal organizations are thus given wide latitude to carry out more or less aggressive Indian preference policies.

For instance, under existing regulations, one Tribe may use Indian preference only as a tie-breaker factor when two applicants are otherwise equally qualified for a job. Another Tribe may apply Indian preference when two applicants meet the minimum qualifications for a job, even though the non-Indian applicant has substantially greater qualifications. A third Tribe may apply Indian preference to require the hiring of an applicant who is less than fully qualified, subject to a training program to bring the applicant's qualifications up to the requirements of the position.

By contrast, subsection (c) of the Draft would generally establish a single policy which all Tribes and tribal organizations would be required to follow. Aside from shifting away from current departmental policy, subsection (c) represents a serious intrusion into the sovereign determination of a Tribe how best to pursue the goal of Indian preference mandated by Congress.

The other major issue raised by Section 900.115 (also discussed in the preliminary Summary) is the interdepartmental disagreement regarding tribal preference policies. Interior Department officials are of the view that Section 7(b) prohibits a Tribe administering a 638 contract from applying a tribal-member preference, as distinguished from a general Indian preference. The Indian Health Service, on the other hand, sides with Tribes in arguing that *tribal* preference requirements are consistent with the language and goals of Section 7(b). In the earlier Summary section, the Departments request special input on this issue, a matter we are separately researching. Our preliminary assessment is that the Indian Health Service has the better argument.

Section 900.116 – Equal Opportunity and Civil Rights (Draft at 103-104). This section, imposing certain restrictions on tribal employment decisions, runs directly contrary to the tribal exemption from Title VII of the Civil Rights Act, 42 U.S.C. 2000e. In the March 1993 consultation meeting, Interior Department attorneys acknowledged the conflict and appear to agree that Section 900.116 should be deleted.

Section 900.120 – Availability of Information (Draft at 107-108). This section requires that a contractor make all reports and information concerning the contract available to the Indian people being served or represented, apparently even if the information is proprietary to the contractor and would be exempt from disclosure under the Freedom of Information Act if provided by the contractor to the government.

Section 900.121 – Record Retention (Draft at 108-110). In a departure from earlier drafts, new Subsection (b)(1) would require that contractors return certain records to the Secretary of the Interior upon expiration of the relevant records retention period. The

agency officials in attendance at the March, 1993 consultation meeting seemed unaware of this section and the practical problems it would create for most contractors. They could not point to any provision in the statute or other applicable law requiring the transfer of such documents to the National Archives, and it would appear that no authority for this requirement exists.

Section 900.122 – Freedom of Information (Draft at 110–111). This section fails to reflect the exemption presently available for a variety of information, including proprietary financial information. Tribal organizations should be assured that when submitting financial information to the government, including comprehensive audit reports, commercial or other interests doing business with the Tribe will not have unfair access to the Tribe's proprietary financial records.

Section 900.124 – Monitoring (Draft at 111–112). Subsection (c) has been poorly drafted in a way which would oddly permit monitoring visits both by an operating division and the authorized representative of an operating division. A simple editorial correction will correct the problem.

Conclusion. As the foregoing discussion demonstrates, there are a number of critical and severe deficiencies in Subpart A, the core of the draft regulation. While some of the deficiencies are drafting errors which agency officials have agreed to revisit, for the most part they represent a more significant philosophical hostility to turning Secretarial programs over to tribal operation in a manner which fully equips the tribal contractor with all of the Secretary's resources. While the draft genuinely appears to embrace the 638 contracting process itself, the Departments appear to be simultaneously struggling to find ways of preserving their agencies intact even as programs are transferred to tribal operation. Unless Congress is going to substantially increase contract support cost funding, the price of the "638" contracting process is, indeed, the partial dismantling of federal agencies. Only when the agencies are prepared to plan for and embrace that process, will there be a policy basis in place for revising the draft to fully comply with the Act.

We next turn to a discussion of the remaining subparts.

IV

SUBPART B – PRE-AWARD AND PROPOSAL PROCESS

Subpart B generally deals with the application and review processes which would govern prior and up to the award of a contract under the Indian Self-Determination Act.

Section 900.202(a)(2)(iii) (Draft at 113). This subsection fails to include "urban corporations" established pursuant to the Alaska Native Claims Settlement Act as eligible contractors, contrary to a ten-year-old opinion of the Office of the Regional Solicitor in Alaska.

Section 900.203 – Preapplication Technical Assistance (Draft at 114–116). Subsection (a)(4) requires the Secretary to provide requested technical assistance for a Tribe to develop program standards which might differ from the Interior Department requirements set forth in Subpart O. However, the subsection fails to specify that similar technical assistance must be provided to assist a tribal contractor in developing program standards which differ from the IHS standards set forth in Subpart N. The effect is to further undermine the ability of Tribes to depart from IHS's program standards in attempting to redesign programs to better meet local needs and tribal priorities.

Subsection (c) is curious in that it calls upon the Secretary, when receiving a request for certain information, to "identify the Secretarial amount and provide information regarding the availability of contract support costs." (*Id.* at 115–116). Although in our experience IHS Area officials generally do explain that all contract support costs are available to the contractor, subject only to the availability of appropriations from Congress, BIA agency and Area officials consistently take the view that there are no contract support costs available for tribal contractors seeking to develop a new contract proposal. The regulation should be directed not at what BIA or IHS think they have available for contract support costs, but at what the Tribe is entitled to under the Act.

Section 900.204 – Access to Federal Records (Drafts 116–118). Subsection (c)(5) fails to require that the Secretary provide all available information on existing facilities, and is instead limited to "appraisals, inventories and assessments of trust resources."

Section 900.205 – Initial Proposal Requirements (Draft at 118–122). This subsection addresses the basic requirements which the Departments would require be included in a contract application. These requirements in and of themselves are generally not objectionable. However, in connection with contracts which involve the administration of trust resources (such as the operation of timber programs, wildlife programs, agricultural programs, and the like), subsection (i) mysteriously requires that a contract "include inventory levels and values to Tribes and to individuals." (*Id.* at 119). No further explanation is provided as to the meaning of this requirement.

Section 900.206 – Review and Approval of Contract Proposals (Draft at 122–125). Subsection (a) is deficient in several respects. First, subsection (a)(1) calls for a contract proposal to be returned without further action if it does not "contain the required

resolutions", even though an earlier section permits a contract proposal to reference tribal resolutions already on file with the Department. (Section 900.205(d), Draft at 118)

More seriously, subsection (a)(4) (*id.* at 123-124) purports to set forth four bases upon which the government may refuse to approve a contract other than the "declination" process set forth in Section 102(a)(2) of the Act. The regulations propose that other reasons for refusing to enter into a contract include objections based on "contractibility", "availability of funds", "terminat[ion] [of] any existing trust responsibility", and "analyses required for compliance with NEPA, the Endangered Species Act, the Coastal Zone Management Act, the National Historic Preservation Act, . . . or other applicable federal statutes. . . ." The law clearly provides only one means for disapproving a contract -- the declination process. Here, as elsewhere in the regulation, the Departments are seeking to establish additional impediments and barriers to 638 contracting -- one of the key problems Congress explicitly sought to remedy in the 1988 Amendments. All of the separate reasons supporting a decision to disapprove a contract are embraced within the "declination" criteria set forth in the Act, and should be handled strictly according to the declination process set forth in the Act.

Subsection (b) is deficient in failing to mandate that a declination notice must contain a description of "all" appeal rights and available technical assistance. *See* Draft at 124. Subsection (c), combined with the long recitation of items which must be contained in a contract proposal pursuant to Section 900.205, would permit perpetuation of the current practice in many areas of BIA and IHS to repeatedly return contract proposals to contractors as allegedly "incomplete". Through this device, agency officials seek to avoid the mandatory sixty-day clock imposed by statute for the benefit of Tribes. To honor the timeframes mandated in the Act, the regulations should state that an incomplete contract proposal will be declined within the sixty-day period if the deficiency is of such a nature that the contractor cannot properly complete or maintain the activity to be contracted.

Section 900.207 - Declination (Draft at 125-129). This section is key to the entire regulatory scheme. Unfortunately, it, too, is seriously deficient. For instance, subsection (a) is carefully drafted in a way to preserve the Departments' view that decisions regarding contractibility and funding are not within the declination process.

Subsection (c) (*id.* at 126) repeats the objectionable position that a contract can be declined based on the effect that awarding a contract would have on other programs (or portions of programs) administered by the Secretary.

Subsection (c)(1) would provide a basis for the Secretary to intrude upon internal decisions of a Tribe by questioning whether a tribal resolution endorsing a contract

proposal truly reflects the best interests of the tribal community. (Here agency officials indicate they may recommend further revisions.)

V

SUBPART C - CONTRACT AWARD AND MODIFICATION

This section deals generally with various contract administration issues.

Section 900.302 - Calendar-Year Contract (Draft at 130). The language on calendar-year funding makes no sense as presently drafted. Agency officials have agreed to consider deleting the opening phrase to clarify this section. As clarified, the regulation would provide that contracts will be awarded on a calendar-year basis unless there is mutual agreement to a different funding period.

Section 900.303 - Types of Contracts (Draft at 130). This Section would eliminate any provisions regarding the use of "fixed price" contracts for the operation of 638 programs. Instead, such contracts would be the subject of negotiation without the guidance of any regulatory standards.

Section 900.304 - Renewal and Continuation of Contracts (Draft at 130-132). Subsection (a)(2) (*id.* at 131) would improperly permit the Secretary to involuntarily extend a contract for an additional year, notwithstanding the absence of any indication from the tribal contractor that it desires to continue operating the program. Absolutely no authority in the Act exists for compelling a Tribe to involuntarily operate a program in this manner. While in certain circumstances some moderate provisions may be necessary to assure the effective transition of programs from tribal operation back to government operation, the very same section indirectly endorses the concept of a shorter four-month transition period, a far more reasonable period.

Subsection (a)(3) and subsection (b)(1) both fail to note that the requirement to schedule expenditures should only be indicated to the extent necessary to calculate advance payments; where a Tribe manages its own advance payments, no such schedule should be required.

Subsection (b)(3) would punish a Tribe in a subsequent year for failing to submit a budget, by underfunding the new contract cycle. Such punitive action is both contrary to the Act and inconsistent with the congressional appropriations covering the new funding cycle.

Section 900.305 - Contract Modifications (Draft at 132-134). Subsections (a)(3) and (4) improperly would authorize the Secretary to unilaterally amend a contract to

extend the contract period, and to do so at underfunded levels. (*Id.* at 133) Subsection (a)(5) would improperly permit unilateral modifications to reduce the funds available to the contract.

Subsection (c) improperly requires a full-fledged contract proposal in order to make any "material change" in the "scope, population served, or the nature, standards or objectives of the services to be provided" under a contract. The goal of increased flexibility in tribal discretion in the administration of programs is hardly promoted by requiring such excessive and unnecessary paperwork.

Section 900.306 - Consolidation of Mature Contracts (Draft at 134). Subsection (a) fails to mandate the consolidation of contracts awarded by the same agency or bureau, instead making such consolidation discretionary with the Secretary.

Section 900.307 - Contents of Award Document (Draft at 134-138). In one of the more egregious violations of the Act, the Draft proposes in subsection (c) (*id.* at 137) that the Secretary may immediately suspend a contract "upon determination by the Secretary that the contractor's continued performance would impair the Secretary's ability to discharge his trust responsibility." This provision flies directly in the face of the very carefully-crafted reassumption procedures set forth in Section 109 of the Act, dealing both with ordinary reassumption and emergency reassumption. The Secretary has ample discretion within the reassumption process to temporarily or permanently take back the operation of a contracted program, and this secton only undermines a Tribe's due-process rights to a hearing in absence of any nonemergency reassumption. Indeed, by the admission of agency representatives, the proposed contract-suspension remedy has been added to specifically defeat the procedural rights which Tribes enjoy under the reassumption provisions of the statute.

Section 900.309 - Designation as a Mature Contract (Draft at 139). Subsection (b) is deficient in failing to require that new activities be added to an existing mature contract. Rather, the current draft makes addition of such new activities discretionary with the Secretary. Moreover, adding an activity to a mature contract while preserving the reporting benefits of "mature contract" status, is only possible in a very narrow range of situations. The fact that a new activity may involve different programmatic expertise should not automatically bar the addition of such an activity into a mature contract.

Section 900.310 - Commencement of Services (Draft at 139-140). Subsection (b) indirectly refers to "preaward costs". However, nowhere does the regulation fully discuss preaward costs nor the standards applicable to the incurring and reimbursement of preaward costs.

Generally, in IHS Area Offices preaward costs are negotiated at the time of final contract negotiation, and are not necessarily subject to any preapproval requirement

(provided the preaward costs are agreed by the agency to be reasonable). At the other end of the spectrum, many BIA offices flatly refuse to reimburse *any* preaward costs of any nature whatsoever. The regulation should set forth a uniform approach which encourages prudent management steps by tribal contractors seeking to put into place the measures necessary to permit commencement of a contracted program at a full level of service delivery. The regulation should build on the IHS approach in this regard.

VI

FINANCIAL MANAGEMENT

This Subpart (Draft at 140–156) addresses most of the financial management rules applicable to 638 contractors (to the extent not already noted in Subpart A).

Section 900.404 – Allowable/Unallowable Costs (Draft at 142). Subsection (b) provides that the allowability of costs incurred under a contract shall be determined by the content of whatever OMB circulars may be in effect when the questioned cost is incurred. As such, this section would permit the Office of Management and Budget (OMB) to amend circulars without going through the special tribal participation and notice and comment rules set forth in the Indian Self-Determination Act for amending "638" regulations. Many Tribes object to the resulting lack of effective input into the process for amending OMB circulars.

Section 900.405 – Waiver of Prior Approval Requirements (Draft at 142–143). This section fails to specify that the itemized categories of costs will be deemed allowable without prior approval, whether or not the costs are charged directly to the contract or are charged to the indirect-cost pool established for the contract. More seriously, only six of the many categories of costs identified in prior discussions as meriting like treatment have been included in the draft.

Section 900.406 – Indirect Costs (Draft at 143–147). Subsection (a)(1) represents a blatant effort by the agencies to avoid any liability for indirect-cost shortfalls due to the failure of other agencies to pay their full share of indirect costs into the indirect cost pool established for the contractor. Thus, the regulations would require multiple rates for contracts funded by each Secretary, an approach which is sure to produce accounting nightmares both for tribal contractors and government negotiators and auditors.

The recent discussions with agency officials underscored the resolve of the agencies to refuse to report such indirect shortfalls to Congress, and more importantly, to not fund such shortfalls, in the absence of new legislation. This refusal is echoed in subsections (d)(1) and (4). *See* Draft at 145–146.

Section 900.408 - Payment (Draft at 147-149). Like the contract-suspension provision set forth in Subpart C, under Section 900.406(e), the Departments would purport to vest in themselves the power to withhold funds from tribal contractors in certain situations, again entirely outside the reassumption procedures set forth in the Act, and without any procedural protections of any nature whatsoever.

The circumstances under which the withholding of funds would occur is particularly ironic. The Departments propose that when a contractor is deficient in such areas as financial management, the submission of quarterly financial reports or the submission of annual audits, the government reserves the right to withhold from the contractor the funding necessary to perform the deficient action. Thus the contractor is denied the very resources needed to undertake that which the agency complains has not been done. Such a provision is thus not only illegal, but absurd. Interestingly, it is also plainly not what occurs when government officials fail to comply with financial management or reporting requirements applicable to government-operated programs.

VII

SUBPART E - PROPERTY MANAGEMENT

This Subpart sets forth the minimum requirements imposed on tribal contractors with respect to property management.

Much of the excessively-burdensome provisions set forth in this section stem from the threshold determination by the agencies to refuse to donate federally-owned personal property to the tribal contractor when such property is furnished to the tribal organization for use in performance of the contract. By refusing to donate or otherwise transfer such property to the Tribe, the Tribe becomes encumbered with a very complex property accounting system necessary to continue keeping track of federally-owned property. When the property runs past its useful life, the federal government's requirements become particularly bureaucratic and burdensome.

Section 900.502 - Federally-Owned Personal Property (Draft at 156-160). Section 900.502 sets forth the basic procedures for administering such government-owned property. Unless the agencies alter their position and are prepared to donate such property to the tribal organization (subject, of course, to the right to demand the return of any property still in use at the termination of a contract), the only remedy to simplify this process is legislative reform. Specifically, Congress could amend the Act to provide that title to government property furnished to a tribal organization in connection with a "638" contract shall be transferred to the tribal organization, subject to a reversionary interest. (This unfortunate policy is repeated in Section 900.504(a)(1) (Draft at 164).)

Section 900.503 - Contractor-Owned Personal Property Purchased With Contract Funds (Draft at 160-164). In contrast to the unfortunate provisions regarding government-furnished property, this section provides that title to property purchased with contract funds shall vest in the tribal contractor (again, subject to appropriate reversionary interests). Tribes will be pleased with this major shift in the Departments' position here from earlier drafts. As reflected in the Draft at page 161, within this setting tribal contractors would have the discretion to follow their own property-management procedures for dealing with such property, a far less cumbersome process than following the procedures applicable to government-owned property.

Section 900.509 - Federally-Owned Real Property (Draft at 169-171). Subsection (b) contemplates that a contractor may purchase office space for use in the performance of a contract, but restrictively states that the purchase of real property for such purposes cannot occur absent "specific legislative authority and Secretarial approval." Such restrictions foreclose contractors from the management flexibility necessary to efficiently operate contracts.

Similarly, subsection (c) would bar Tribes from leasing new, expanded or replacement space with IHS-contract funds, except through the IHS Lease Priority System. Interior, by contrast, would impose no restriction on the leasing of whatever real property a Tribe may "determine necessary for the performance of work or delivery of services."

Section 900.511 - Donation of Excess and Surplus Real Property (Draft at 173-176). Subsection (a)(1) again repeats the unfortunate policy that property will not be considered "excess" by virtue of its use by a Tribe in connection with the performance of a "638" contract.

Subsection (a)(3) imposes an unnecessary layer of bureaucracy by requiring that when a contractor requests conveyance of "excess property", the request must be supported by a resolution from "the tribal governing body of the Tribe serviced" by the contract. (Draft at 173-174) Such a requirement serves no useful purpose in circumstances involving multi-tribal organizations serving as many as thirty, forty, or fifty Tribes.

VIII

SUBPART F - PROCUREMENT MANAGEMENT

This Subpart deals with minimal procedures which tribal contractors would be required to follow in connection with the procurement of property and services, including subcontracting and general purchasing.

Section 900.605 - Procurement from Indian Organizations (Draft at 186-187). The issues regarding Indian preference discussed above in connection with Subpart A arise here as well. The regulations fail to respect a Tribe's right to apply a tribal-preference policy, and further fail to respect the discretion which Tribes may exercise in how they carry out the preference policy mandated by Section 7(b) of the Act.

Section 900.608 - Procurement Award Provision (Draft at 190-192). Subsection (k) (*id.* at 192) fails to state clearly that tribal employees are not subject to the Davis-Bacon wage and labor standards. Also, subsection (j) (*ibid.*) should be deleted, consistent with the observations made earlier in connection with Section 900.116 in Subpart A.

Section 900.610 - Discounted Services (Draft at 193). This section totally fails to address the status of Tribes as mandatory users of federal government rates or discounts when carrying out government-to-government contracts awarded pursuant to the Indian Self-Determination Act. Instead, this section treats Tribes just like any other cost-reimbursement contractor doing business with the government. The effect, of course, is to substantially increase the cost of administering programs following transfer from federal administration to tribal administration.

IX

SUBPART H - APPEALS, DISPUTES AND EQUAL ACCESS TO JUSTICE ACT

As its title suggests, Subpart H (Draft at 193-220) addresses tribal avenues for dealing with decisions made by government officials in connection with the award of contracts or decisions made in the administration of contracts. Unfortunately, Subpart H fails to deal with the persistent problem of agency officials who refuse to take any action, to the severe detriment of tribal contractors. Although the Bureau of Indian Affairs has an appellate procedure for addressing such problems in 25 C.F.R. Part 2.8, no comparable procedure exists for other agencies of the Interior Department, nor is there a comparable procedure for the Department of Health and Human Services. Given that many of the problems encountered by tribal contractors involve the failure of government employees to take action, there is a compelling need to address this issue comprehensively in the new regulations.

Along similar lines, the regulations should make clear that tribal contractors confronted with the failure of an agency official to act on a contract proposal within the first sixty days are entitled to go directly to court for a judicial remedy ordering the agencies to

award the contract. Although agency representatives recently agreed that court review is available in such circumstances, often government attorneys argue that a Tribe should have to exhaust some administrative remedy by first presenting its complaint to the agency. Subpart H should make clear that no administrative exhaustion of remedies is required when a government official fails to approve or award a contract within the mandatory timeframe established in the Act.

We next discuss some of the highlights in the areas which are covered in Subpart H.

Section 900.802 - IHS Appeals (Draft at 193-203). Among the gravest problems in this section are the procedures governing appeals over contract funding decisions made by IHS officials. The problems here are many. First, under subsections (a)(1) and (2), a Tribe would be limited to challenging whether or not the agency had properly followed its own allocation formulas in determining how much funding to award a contract. Although this may certainly be one area of dispute, it is not the only dispute which may arise in connection with the funding of contracts.

Specifically, many disputes arise over the issue of contract support costs. The agencies take the position that they should only be challenged on appeal regarding how contract support costs appropriated by Congress were made available to the contractor. This means that if a contractor believes it was entitled to $100,000 in contract support costs, but the agency only awarded $70,000 on the ground that Congress had not appropriated any more funds, the contractor would be unable to appeal its entitlement to the additional $30,000. The agencies would instead view the maximum amount which the tribal contractor is entitled to receive as $70,000. Through this scheme, a contractor would also never have a contract-support cost shortfall, by the agencies' view of the world, the contractor is only entitled to such sums as the agency may receive from Congress.

Obviously this is not what Congress had in mind in Section 106 of the Act. To the contrary, Congress intended that a full and fair determination be had regarding a Tribe's need for contract support costs. To the extent funds available to the agency are insufficient to pay those full costs, the Department is to report the shortfall to Congress so that appropriate remedial action may be taken through supplemental appropriations. The IHS approach on "funding" appeals directly undermines the congressional scheme set forth in Section 106 of the Act.

The second major problem with the IHS funding appeal mechanism is the absence of any appeal beyond the IHS Director. In marked contrast to appeals involving comparable Interior Department decisions, the draft proposes that funding decisions will never be reviewed by any official higher than the IHS Director. (Recently proposed amendments would require that such decisions be made at a level no lower than the Assistant Secretary for

Health.) The establishment of a contract funding Appeals Board is more form than substance, since the Board would be limited only to the power to recommend a decision to the IHS Director. Similarly, an "on the record" appeal in conformity with the Administrative Procedures Act would not be available in such instances, and the members of the Board would all be appointed by the IHS Director and serve at his or her pleasure.

Subsection (g) (Draft at 199-200) is deficient in failing to state clearly the right of Tribes to subpoena witnesses in the ordinary "on the record" hearings that are provided for IHS appeals involving issues other than contract funding determinations. In such matters (and, again, unlike funding appeals) the Draft would require that a final decision be made at a level no lower than the Assistant Secretary for Health (*see* subsection (i) at 201).

Section 900.803 - Interior Appeals Procedures (Draft at 203-212). The matters which are subject to appeal in Section 900.803 (DOI) differ somewhat from the matters subject to appeal in Section 900.802 (DHHS), without apparent justification. In the area of funding appeals, however, the Interior Department clearly parts company with IHS by handling funding appeals in a manner identical to any other appeal involving an agency official's decision not to award a contract as requested. Interior's approach is consistent with the Act.

In one unusual provision, Interior would permit a system whereby the statutory right to a hearing could be quite easily and inadvertently waived by establishing on a Tribe the duty to request a hearing within thirty days of receipt of the decision being appealed. *See* subsection (b), Draft at 204.

The balance of Section 900.803 includes procedures for the convening of an *ad hoc* appellate body with interdisciplinary skills, in the event appeals involve programs other than those of the Bureau of Indian Affairs. Final decisions for the Department are made within the Office of Hearings and Appeals.

Not surprisingly, as with 900.802 (DHHS), absolutely no appeal mechanism is provided for challenging the Interior Department's purported power to suspend a contract or discontinue contract funding under earlier provisions of the regulations.

The balance of the Subpart is largely devoted to the Equal Access to Justice Act (section 900.804) and to the procedures relevant to post-award contract disputes, governed by the Contract Disputes Act (section 900.805).

X

SUBPART I - LIABILITY INSURANCE AND FEDERAL TORT CLAIMS ACT COVERAGE

This Subpart (Draft at 220-232) is deficient more in what it fails to state than in what it chooses to address. That is, very little information is provided regarding FTCA procedures, nor the scope of FTCA coverage. Indeed, far more information is provided in a 1992 memorandum issued by the Indian Health Service on FTCA coverage. More helpful would thus be a complete recitation of the procedures which are followed before and after a claim is filed or suit is instituted against a tribal organization, an explanation of the scope of the coverage available under the Federal Tort Claims Act, and an explanation of the limit of the areas of liability not covered by the Federal Tort Claims Act (such as property damage, fire and casualty, worker's compensation, and so forth).

While it is understandable that the Departments may be reluctant to set forth provisions which might prejudice the defense of the United States in suits ultimately brought under the Federal Torts Claim Act, that interest must be balanced by a need to fully inform Tribes and their employees regarding the full scope of the Act.

XI

SUBPART J - CONSTRUCTION CONTRACTS

This Subpart (Draft at 232-343) sets forth the unique provisions applicable to construction contracts by virtue of the application of the Federal Acquisition Regulations (FARs).

One major issue raised in connection with this Subpart concerns savings when construction is performed under a cost-reimbursement contract. In section 900.1013 (Draft at 246), the regulations propose that such savings must be "returned to the Secretary" in apparent conflict with the statutory requirement (section 106(a)(3)) that all savings incurred under a self-determination contract be available to the tribal contractor to carry out the general purposes of the contract.

We have not had an opportunity to thoroughly review the FAR clauses set forth in the lengthy tables commencing on page 252 and running through page 343. Since these clauses are unique to construction contracts, we shall discuss these clauses separately with the Tribes we represent which are actively involved in construction contracting.

Section 900.1106 - Reassumption of Programs (Draft at 350-353). The reassumption sections, although somewhat modified from the statute, generally appear consistent with congressional intent and the case law which has developed under these sections.

XIII

SUBPART L - DISCRETIONARY GRANTS

The only major issue which has arisen to date in connection with this Subpart (Draft at 353-368) concerns section 900.1207, dealing with grants for the construction of facilities. Tribes are specifically concerned with OMB circular impediments to charging depreciation or recovering fair market rental value when facilities are used in the operation of "638" contracted programs. While leasing back facilities to the Secretary may be reasonable in certain circumstances, the rules regarding allowable costs set forth in Subpart D should be revisited to permit Tribes to recover fair market rental value in these circumstances.

XIV

SUBPART M - SECRETARIAL REPORTS AND CONSULTATION REQUIREMENTS

Section 900.1301 - Secretary's Annual Report to Congress (Draft at 368-370). Subsection (f) (*id.* at 369) fails to require that all contract support cost shortfalls, whether charged directly or against an indirect-cost pool, are to be reported to Congress. This issue may be appropriately covered in subsection (b) insofar as the current fiscal year is concerned, but not with respect to anticipated shortfalls in the next fiscal year.

No other major issue has yet arisen in connection with Subpart M.

XV

SUBPART N - DHHS PROGRAM STANDARDS

(Draft at 370-377) Earlier drafts of the DHHS program standards embodied a principle of local flexibility. In contrast, the new draft is quite rigid in requiring compliance with a variety of standards, including Joint Commission on Accreditation of Health Care Organizations (JCAHCO) and Health Care Finance Administration (HCFA) standards, **even where IHS itself has failed to meet such standards.** Although IHS attorneys state that the

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XII

RETROCESSION, RESCISSION, REASSUMPTION

This Subpart (Draft at 344-353) deals with the various ways in which a program operated by a Tribe may be returned to federal administration.

Section 900.1101 - Retrocession. Subsection (a) improperly restricts the ability of a Tribe to return a portion of a contract to federal administration. Only where the remaining contract cannot be properly completed or maintained -- a basis for declination of a contract proposal -- (or for a similar "declination" reason) should a Tribe be restricted from retroceding a portion of a contract.

Subsection (c) requires that retrocession become effective one year from the date that retrocession is requested. This section fails to recognize that no retrocession is involved when a Tribe simply determines not to renew a contract, and instead allows it to lapse.

Section 900.1103 - Procedure in the Event of Breach of Contract by a Tribal Organization (Draft at 346-348). This odd provision stems from the Departments' view that the retrocession provision of the statute (section 106(e)) does not literally contemplate a tribal organization (as opposed to a Tribe) retroceding a program back to the Secretary. In the event a tribal organization no longer wishes to continue operating a contract, the Departments -- limited by their overly-narrow reading of the statute -- have developed a fiction that the tribal organization is proposing to breach its contractual obligations in the future, thus leading to the awkward name of this section.

The Departments should simply state that a tribal organization, like a Tribe, can retrocede a program to the Secretary. Interestingly, the Departments' view of Section 106(e) of the Act is not even consistent within this Subpart. Thus, in the very next section (900.1104) the Draft speaks of retrocession procedures instituted *by a tribal organization* serving multiple Tribes.

Section 900.1105 - Effect of Retrocession (Draft at 349-350). Subsection (a)(3) remarks that retrocession can prejudice a Tribe's ability to secure a contract in the future. This provision is disturbing, since retrocession is a voluntary act by a Tribe. While it would certainly not be objectionable to state in Subpart B that the Departments will consider a tribal contractor's previous performance of a contract in determining whether or not to decline a contract proposal, such a provision is far different than language which actually prejudices a voluntary retrocession.

obligation of a contractor in this regard is a "best efforts" obligation, the proposed regulatory language does not so provide. Although it would seem axiomatic that the ability to meet such standards should be contingent on the availability of contract funding sufficient for this purpose, to date DHHS refuses to incorporate such a principal in the regulation.

Similarly, Section 900.1403 fails to assure that while the cost of standards compliance are allowable costs (*see* subsection (j), Draft at 375), sufficient funds must be awarded to the contractor to meet this obligation.

Section 900.1404 - Fair and Uniform Provision of Services (Draft at 376-377). But for the failure to address a tribal *organization's* administrative or judicial tribunal and its power to adjudicate patient complaints, this section reflects a positive policy by DHHS not to interfere in the internal processes of a Tribe in connection with the enforcement of the "fair and uniform service" mandate of the Act. (However, the health care eligibility regulation (which is currently on hold is due to a congressional moratorium) would entitle a patient who is denied services by a tribal organization to take an appeal directly to the Indian Health Service. Such appeals outside the internal tribal process deny tribal accountability and undercut the principle of tribal self-determination and sovereignty.)

More seriously, the Interior Department would take quite a different approach -- and one hostile to 638 contractors. Specifically, in an effort to reverse the *Martin v. Area Director* decision involving the Assiniboine and Sioux Tribes of the Fort Peck Reservation, DOI would establish in the regulations a provision for third parties or recipients of services to file complaints against Tribes through the appellate mechanisms of the Department of the Interior. *See* Section 900.1502(2), Draft at 387, referring such complaints to the "Indian Self-Determination contract compliance officer designated by the Secretary." Nothing in the Indian Self-Determination Act warrants such a substantial intrusion into internal tribal affairs.

XVI

SUBPART O - INTERIOR DEPARTMENT PROGRAM STANDARDS

As with Subpart N, Subpart O would straightjacket Tribes into the program standards which govern federal administration of contracted programs. This, in turn, deprives Tribes of the programmatic flexibility which is one of the cornerstone goals of the Act, and one of the stated policies set forth early in Subpart A.

XVII

SUBPART P - REGULATION ADMINISTRATION

No major issue has yet arisen in connection with this Subpart, other than the issue (already noted in connection with Subpart D) permitting future amendments of OMB circulars to be automatically incorporated into the Indian Self-Determination Act regulations without any separate "638" rulemaking proceeding.

XVIII

CONCLUSION

As the foregoing Report makes clear, there are major sections in the January 1993 Draft Regulation which are markedly hostile to tribal contracting interests. While the new Administration may well give the regulations a fresh look, either before or after publication of a proposal in the *Federal Register*, even some agency representatives now acknowledge the value of further amending the Act to clarify its provisions for all concerned, and to eliminate disagreements between both the Departments and between agencies within each Department.

Insofar as the regulation-drafting process is concerned, the next step in the process is for each Department to determine how and when it will complete clearance of the Draft Regulations so that they can be returned to the OMB for further review prior to any *Federal Register* publication. Given the pressing need for regulatory reform in the field, Tribes can only hope that the agencies will apply all deliberate speed to this task. Even still, however, it is highly likely that **between fifteen and eighteen months more** will be consumed by the agencies, under any scenario, before final regulations are in place. In the meantime, if history repeats itself it appears that field officials will continue to either misinterpret or otherwise fail to fully apply the provisions of the 1988 and 1990 amendments to the Indian Self-Determination Act.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE,
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By: Lloyd Benton Miller

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DRAFT TECHNICAL AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT

(showing new language in *italics and bold* and deleted language with ~~strikeouts~~)

(May 3, 1993)

1. Amendment No. 1

Under "Definitions", section 4, (25 U.S.C. 450b) insert new subsection (a) to define "construction contract" (and redesignate all other subsections accordingly), as follows:

> Sec. 4. For purposes of this Act, the term --
>
> *(a) 'construction contract' means a fixed-price or cost-reimbursement self-determination contract for any construction program other than a contract limited to providing architectural and engineering services, planning services, and/or construction management services, and other than a contract for the Housing Improvement Program, or for the roads construction and maintenance program, administered by the Secretary of the Interior.*

2. Amendment No. 2

Amend section 5(f) (25 U.S.C. 450c(f)), to substitute "*receives*" for "received"; to delete "Indian tribe" and add in its place "*tribal organization*"; delete all of the subsection after the words "to the appropriate Secretary" through the word "expended," and insert in lieu thereof the words "*a single agency audit report as required by Chapter 75 of Title 31, United States Code. Such tribal organization shall also submit such*"; add after the words "Title 5" the following words: "*, United States Code, except that the Secretary shall only request the minimal information necessary to assure the delivery of satisfactory services and protection of trust resources, consistent with the purposes of this Act to vest primary responsibility for the administration of contracted programs in the tribal organization.*" As amended, section 5(f) of the Act (25 U.S.C. 450c(f)) will read as follows:

> For each fiscal year during which an Indian tribal organization ~~received~~ *receives* or expends funds pursuant to a contract or grant under this subchapter, the ~~Indian Tribe~~ *tribal organization* which requested such contract or grant shall submit ~~to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and~~

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~~purposes for which Federal funds were expended,~~ *a single agency audit report as required by chapter 75 of Title 31, United States Code. Such tribal organization shall also submit such* information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request through regulations promulgated *in conformity with* **under** sections 552 and 553 of Title 5, *United States Code, except that the Secretary shall only request the minimal information necessary to assure the delivery of satisfactory services and protection of trust resources, consistent with the purposes of this Act to vest primary responsibility for the administration of contracted programs in the tribal organization.*

3. Amendment No. 3

Amend section 7(a) (25 U.S.C. 450e(a)) to delete the word "of" before the word "subcontractors" and insert in lieu thereof the word "*or*"; and add after the word "subcontractors" the words: "*(excluding tribal organizations)*". As amended, section 7(a) (25 U.S.C. 450e(a)) will read as follows:

> (a) All laborers and mechanics employed by contractors *or* subcontractors *(excluding tribal organizations)* in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended [40 U.S.C.A. 276a et seq.]. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

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4. Amendment No. 4

Amend section 7 to add a new subsection (c):

> *(c) Notwithstanding subsections (a) and (b), where a self-determination contract, or portion thereof, is intended to benefit one tribe, a tribal organization contracting under this Act shall comply with tribal employment or contract preference laws adopted by such tribe.*

5. Amendment No. 5

Amend section 102(a)(1) (25 U.S.C. 450f(a)(1)) by inserting at the end thereof the following sentence: "*Such programs shall include administrative functions of the Department of the Interior or the Department of Health and Human Services which support the delivery of services to Indians, including those administrative activities related to, but not part of, the service delivery program, which are otherwise contractible, without regard to the organizational level within the Department where such functions are carried out.*" As amended, section 102(a)(1) (25 U.S.C. 450f(a)(1)) of the Act will read:

> (E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human services or the Department of the Interior within which it is performed.
>
> *Such programs shall include administrative functions of the Department of the Interior or the Department of Health and Human Services which support the delivery of services to Indians, including those administrative activities related to, but not part of, the service delivery program, which are otherwise contractible, without regard to the organizational level within the Department where such functions are carried out.*

6. Amendment No. 6

Amend section 102(a)(2) (25 U.S.C. 450f(a)(2)) by adding the words "*, or to amend or renew a self-determination contract,*" before the words "to the Secretary"; and by striking the word "The" in the second sentence and adding in lieu thereof the following phrase: "*Subject to the provisions of subsection (4) hereof, the*". As amended, section 102(a)(2) (25 U.S.C. 450f(a)(2)) of the Act will read:

> (2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, *or to amend or renew a self-determination contract*, to the Secretary for review. ~~The~~ *Subject to the provisions of subsection (4) hereof, the* Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that--

7. Amendment No. 7

In section 102(a)(2)(A) (25 U.S.C. 450f(a)(2)(A)), add the words "*by the tribal organization*" after the word "rendered". As amended, section 102(a)(2)(A) (25 U.S.C. 450f(a)(2)(A)) of the Act will read:

> (A) the service to be rendered *by the tribal organization* to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

8. Amendment No. 8

In section 102(a)(2)(B) (25 U.S.C. 450f(a)(2)(B)), add the words "*by the tribal organization*" after the word "resources". As amended, section 102(a)(2)(B) (25 U.S.C. 450f(a)(2)(B)) of the Act will read:

> (B) adequate protection of trust resources *by the tribal organization* is not assured; or

9. Amendment No. 9

In section 102(a)(2)(C) (25 U.S.C. 450f(a)(2)(C)), add the following after the word "contract": ", *either because (i) the amount of funds proposed in the contract is in excess of the funding levels specified in section 106(a) of this Act, (ii) the program (or portion thereof) to be contracted is beyond the scope of paragraph (1) hereof, or (iii) the existence of some other deficiency justifying declination under this section.*" As amended, section 102(a)(2)(C) (25 U.S.C. 450f(a)(2)(C)) of the Act will read:

> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract, *either because (i) the amount of funds proposed in the contract is in excess of the funding levels specified in section 106(a) of this Act, (ii) the program (or portion thereof) to be contracted is beyond the scope of paragraph (1) hereof, because the proposal includes activities which cannot be lawfully carried out by the contractor, or (iii) the existence of some other deficiency justifying declination under this section.*

10. Amendment No. 10:

In section 102(a) (25 U.S.C. 450f(a)), add a new subsection (4):

> *(4) With the approval of the tribal organization, the Secretary shall approve any severable portion of a contract proposal which does not support a declination finding as provided in paragraph (3). Whenever the Secretary determines under paragraph (3) that a contract proposal (A) proposes in part to plan, conduct or administer a program that is beyond the scope of paragraph (1), or (B) proposes a funding level in excess of the funding levels specified in section 106(a) of this Act, the Secretary shall approve the proposal to the extent authorized by paragraph (1) or section 106(a) of this Act, as appropriate (and subject to any agreed-upon alteration in the proposed scope of work), and in such event subsection (b) hereof shall apply only with respect to the declined portion of the contract.*

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11. Amendment No. 11

Amend section 102 (25 U.S.C. 450f) to add a new subsection (e) as follows:

> *(e) In any hearing or appeal provided under subsection (b)(3), the Secretary shall carry the burden of proof to establish by clear and convincing evidence that the contract proposal should be declined. Final departmental decisions in all such appeals shall be made at a level not lower than the level of the Assistant Secretary.*

12. Amendment No. 12

Amend section 102 (25 U.S.C. 450f) to add a new subsection (f) as follows:

> *(f) A tribal organization in Alaska authorized by tribal resolution(s) to contract under this Act the operation of one or more programs may redelegate that authority, by formal action of the tribal organization's governing body, to another tribal organization provided advance notice of such redelegation and a copy of the contracting proposal, prior to its submission to the Secretary, are provided to all tribes served by the tribal organization. Nothing herein is to be construed as a limitation on the authority of a tribe to limit, restrict or rescind its resolution at any time or in any manner whatsoever. A tribe receiving such notice shall have 60 days from receipt of the notice to notify the tribal organization in writing of its intent to adopt a limiting resolution prohibiting or conditioning the proposed redelegation, and thereafter shall have 60 days to adopt and transmit such resolution to the tribal organization. A tribal organization so notified of a tribe's intent shall not proceed with any redelegation proposal until the expiration of the 60 day period.*

13. Amendment No. 13

Repeal section 105(a) (25 U.S.C. 450j(a)), and reenact it to read as follows:

> (a) Contracts, *grants and cooperative agreements* with tribal organizations pursuant to sections 102 and 103 of this title shall ~~be in accordance with all~~ *not be subject to general* Federal contracting, *discretionary grant or cooperative agreement* laws and regulations, *except to the extent such laws expressly apply to Indian tribes;* ~~except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform to the provisions of sections 270(a) to 270(d) of Title 40: Provided, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act; except, further, that except for~~ *with respect to construction contracts (or subcontracts of such a construction contract), the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et. seq.) and Federal acquisition regulations promulgated thereunder shall not only apply to* ~~self-determination contracts. the~~ *limited extent such statute or regulations are not inconsistent with the provisions or policy of this Act.*

14. Amendment No. 14

Amend section 105(e) (25 U.S.C. 450j(e)) by inserting *"or tribal organization"* after the word "tribe in the first sentence, and after the word "shall" the words *", unless the request for retrocession is rescinded by such tribe or tribal organization,"*. As amended, section 105(e) (25 U.S.C. 450j(e)) of the Act will read:

> (e) Whenever an Indian tribe *or tribal organization* requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall, *unless the request for retrocession is rescinded by such tribe or tribal organization,* become effective one year from the date of the request by the Indian tribe or at such

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date as may be mutually agreed by the Secretary and the Indian tribe.

15. Amendment No. 15

Add to section 105(g) (25 U.S.C. 450j(g)) the words: *"for the provision of personal services"* after the words "make any contract" in the last clause. As amended, the last sentence of section 105(g) (25 U.S.C. 450j(g)) of the Act will read as follows:

> ... Provided, That the Secretary shall not make any contract *for the provision of personal services* which would impair his ability to discharge his trust responsibilities to any Indian tribe or individual.

16. Amendment No. 16

Section 105(f)(2) is amended by deleting the word "including" and inserting in lieu thereof the words: *"except that title to"*; and by inserting the words *"furnished by the federal government for use in the performance of the contract or"* following the word "equipment; and by inserting prior to the semicolon the following: *"shall, unless otherwise requested by the tribe or tribal organizations, vest in the appropriate tribe or tribal organization, and upon retrocession, rescission or termination of such self-determination contract or grant, title in such property having a present value in excess of $5,000 and remaining in use in support of the contracted program shall, at the Secretary's option, revert to the Secretary."* As amended, subsection (105)(f)(2) (25 U.S.C. 450j(f)(2)) shall read as follows:

> (2) donate to an Indian tribe or tribal organization the title to any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, ~~including~~ *except that title to* property and equipment *furnished by the federal government for use in the performance of the contract or* purchased with funds under any self-determination contract or grant agreement *shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization, and upon retrocession, rescission or termination of such self-determination contract or grant, title to such property having*

a present value in excess of $5,000 and remaining in use in support of the contracted program shall, at the Secretary's option, revert to the Secretary; and

17. Amendment No. 17

Amend section 105 (25 U.S.C. 450j) by adding the following new subsections:

(i) Where a self-determination contract requires the Secretary to administratively divide a program which has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall:

(1) endeavor to minimize any adverse effect on the level of services to be provided to all affected tribes;

(2) notify all affected tribes not party to the contract of the receipt of the contract proposal at the earliest possible date, and of the right of such tribes to comment on how the Secretary's program should be divided to best meet the needs of all affected tribes;

(3) explore the feasibility of instituting cooperative agreements amongst the affected tribes not a party to the contract, the tribal organization operating the contract, and the Secretary; and

(4) identify and report to Congress the nature of any diminution in quality, level or quantity of services to any affected tribe resulting from the division of the Secretary's program, together with an estimate of the funds which would be required to correct such diminution.

In determining whether to decline a contract under section 102(a)(2), the Secretary shall not consider the effect which a contract proposal will have on tribes not represented by the tribal organization submitting such proposal, nor on Indians not served by the portion of the program to be contracted. The Secretary shall make such special provisions as may be necessary to assure

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that services are provided to the tribes not served by a self-determination contract.

(j) In consultation with the Secretary, tribal organizations carrying out self-determination contracts are authorized to redesign programs, activities, functions and services under contract to best meet the local geographic, demographic, economic, cultural, health and institutional needs of the Indian people and tribes served under the contract. With respect to contracts or contract amendments which propose the redesign of programs, activities, functions or services, program standards shall be developed by mutual agreement to maximize flexibility while assuring adequate protection of trust resources and the delivery of satisfactory services.

(k) For purposes of section 201(a) of the Act of June 30, 1949 (40 U.S.C. 481(a)) (involving federal sources of supply), an Indian tribe or tribal organization carrying out a contract, grant or cooperative agreement under this Act shall be deemed an executive agency when carrying out such contract, grant or agreement.

18. Amendment No. 18

Section 106(a)(1) (25 U.S.C. 450j-1(a)(1)) is amended to insert after the word "contract" and before the period, the following clause: "*, without regard to the organizational level or levels within the Department at which the program, including supportive administrative functions which are otherwise contractible, is operated.*" As amended, section 106(a)(1) (25 U.S.C. 450j-1(a)(1)) of the Act will read:

> (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, *without regard to the organizational level or levels within the Department at which the program, including supportive administrative functions which are otherwise contractible, is operated.*

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19. Amendment No. 19

Amend section 106(a)(3) (25 U.S.C. 450j-1(a)(3)) to add after the words "self-determination contract" the words: "*(including a cost reimbursement contract involving a construction program)*". As amended, section 106(a)(3) (25 U.S.C. 450j-1(a)(3)) of the Act will read:

> (3) Any savings in operation under a self-determination contract *(including a cost reimbursement contract involving a construction program)* shall be utilized to provide additional services or benefits under the contract or be expended in the succeeding fiscal year as provided in section 13a of this title.

20. Amendment No. 20

Amend section 106(a) (25 U.S.C. 450j-1) by adding a new subsection (4):

> *(4) During the initial year of a self-determination contract there shall be included, in the amount required by paragraph (2), start-up costs which shall consist of the reasonable costs, either previously incurred or to be incurred under the contract on a one-time basis, necessary to plan, prepare for and take over operation of the contracted program and to ensure compliance with the terms of the contract and prudent management, provided that previously incurred costs shall not be included to the extent the Secretary was not notified in advance and in writing of the precise nature and extent of the costs to be incurred.*

21. Amendment No. 21

In section 106(c)(2) (25 U.S.C. 450j-1(c)(2)), insert after the word "costs" the following words: "*and contract support costs*". As amended, section 106(c)(2) (25 U.S.C. 450j-1(c)(2)) of the Act will read:

> (2) an accounting of any deficiency of funds needed to provide required indirect costs *and contract support costs* to all contractors for the current fiscal year;

22. Amendment No. 22

Delete the word "and" at the end of section 106(c)(4); replace the period at the end of section 106(c)(5) with "*; and*"; and add a new subsection (6) as follows: "*(6) a reporting of any deficiency of funds needed to maintain the preexisting level of services to any tribes affected by contracting activities under this Act.*" As amended, section 106(c)(4) through (6) (25 U.S.C. 450j-1(c)(4) through (6)) will read as follows:

> (4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization; and
>
> (5) the indirect cost pool amounts and the types of costs included in the indirect cost pools.*; and*
>
> *(6) a reporting of any deficiency of funds needed to maintain the preexisting level of services to any tribes affected by contracting activities under this Act.*

23. Amendment No. 23

In section 106(d)(2) (25 U.S.C. 450j-1(d)(2)) of the act, add the following: "*Notwithstanding any other provision of law, and subject to the availability of appropriations, every federal agency and every State shall pay its full proportionate share of the indirect costs associated with federally funded contracts or grants awarded to tribes or tribal organizations under any other law. In the event that appropriations are not sufficient for agencies other than the Department of the Interior and the Department of Health and Human Services, or for state governments or state agencies, to pay their full proportionate share as provided herein, the Secretary shall, subject to the availability of appropriations for this purpose, fund such shortfalls and report all unfunded shortfalls to the Congress, as provided in Section 106(a)(2).*" As amended, section 106(d)(2) (25 U.S.C. 450j-1(d)(2)) of the Act will read:

> (2) Nothing in this subsection shall be construed to authorize the Secretary to fund less that the full amount of need for indirect costs associated with a self-determination contract, *Notwithstanding any other provision of law, and subject to the availability of appropriations, every federal agency and every State shall pay its full proportionate share*

of the indirect costs associated with federally funded contracts or grants awarded to tribes or tribal organizations under any other law. In the event that appropriations are not sufficient for agencies other than the Department of the Interior and the Department of Health and Human Services, or for state governments or state agencies, to pay their full proportionate share as provided herein, the Secretary shall, subject to the availability of appropriations for this purpose, fund such shortfalls and report all unfunded shortfalls to the Congress, as provided in Section 106(a)(2)

24. Amendment No. 24

Amend subsection 106(f) (25 U.S.C. 450j-1(f)) to insert after the second full sentence the following new sentence: "*For the purpose of the 365 day period, an audit report shall be deemed received on the date of actual receipt by the Secretary, absent a notice by the Secretary within sixty days of receipt that the report will be rejected as insufficient due to non-compliance with chapter 75 of title 31 of the United States Code, or other applicable law.*" As amended, section 106(f) (25 U.S.C. 450j-1(f)) of the Act will read:

(f) Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to enactment of chapter 75 of Title 31, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 450m-1 of this title. *For the purpose of the 365 day period, an audit report shall be deemed received on the date of actual receipt by the Secretary, absent a notice by the Secretary within sixty days of receipt that the report will be rejected as insufficient due to non-compliance with chapter 75 of title 31 of the United States Code, or other applicable law.* Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 476 of this title.

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25. Amendment No. 25

Amend section 106 (25 U.S.C. 450j-1) to add the following new subsections:

(j) A tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) Without intending any limitation, a tribal organization may, without approval, expend funds provided under a self-determination contract for the following purposes to the extent supportive of a contracted program:

(1) depreciation and use allowances not otherwise specifically prohibited by law;

(2) publication and printing costs;

(3) building, realty and facilities costs, including rental costs or mortgage expenses;

(4) automated data processing and similar equipment or services;

(5) cost of capital assets and repairs;

(6) management studies;

(7) professional services other than services provided in connection with judicial proceedings by or against the United States;

(8) insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property;

(9) costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of a self-determination contract;

(10) interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to Secretarial delays in providing funds under a contract; and

(11) expenses of a tribal organization's governing body to the extent attributable to the management or operation of programs under this Act.

(l) The Office of Management and Budget shall, within twelve months following the date of enactment of this subsection, and with the active participation of Indian tribes and tribal organizations, develop a separate set of cost principles applicable to Indian tribes and tribal organizations consistent with the government-to-government Federal-Tribal relationship embodied in this Act.

(m) Except in connection with rescission and reassumption of a contract under section 109 of this Act, the Secretary shall in no circumstance suspend, withhold or delay the payment of funds to a tribal organization under a self-determination contract.

(n) Program income earned by a tribal organization in the course of carrying out a self-determination contract shall be used by the tribal organization to further the general purposes of the contract and shall not be a basis for reducing the amount of funds otherwise obligated to the contract, provided that use of collections made under Title IV of Pub. L. 94-437 shall be further limited to the extent provided in that Act.

(o) To the extent contracting activities under this Act reduce the Secretary's administrative or other responsibilities in connection with the operation of Indian programs, resulting in savings which have not otherwise been included in the contract amount specified in subsection (a) hereof, and to the extent that doing so will not adversely affect the Secretary's ability to carry out his responsibilities to other tribes and tribal organizations, the Secretary shall make such savings available to tribal organizations contracting under this Act.

26. Amendment No. 26

Section 107(a) (25 U.S.C. 450k(a)) is amended to add after the word "promulgated" the words "*as a single set of*"; to add before the words "in conformity with" the words "*in Title 25 of the Code of Federal Regulations and*"; and to add the following new sentence "*Notwithstanding the preceding sentence, the amendments made by the Indian Self-Determination and Education Act Amendments of 1993 shall be effective as of October 5, 1988.*" The amended section 107(a) (25 U.S.C. 450k(a)) of the Act will read:

> The Secretaries of the Interior and of Health and Human Services are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this subchapter: Provided, however, That all Federal requirements for self-determination contracts and grants under this Act shall be promulgated *as a single set of* regulations *in Title 25 of the Code of Federal Regulations and* in conformity with sections 552 and 553 of Title 5. *Notwithstanding the preceding sentence, the amendments made by the Indian Self-Determination and Education Act Amendments of 1993 shall be effective as of October 5, 1988.*

27. Amendment No. 27

Amend section 109 by inserting after "immediate threat to safety" the following: "*or imminent substantial and irreparable harm to trust resources*". As amended, section 109(d) (25 U.S.C. 450m) of the Act will read in part:

> Each contract or grant agreement entered into pursuant to sections 450F, 450g, and 450h of this title shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, such Secretary may, under regulations prescribe by him and after providing notice and a hearing on the record to such tribal organization rescind such contract or grant agreement and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by him: *Provided,* That the appropriate Secretary may, upon notice to a tribal organization, immediately rescind a contract or grant and resume control or operation of a program, activity, or service if he finds that there is an immediate threat to safety *or imminent substantial and irreparable harm to trust resources* and, in such cases, he shall provide the tribal organization with a hearing on the record within ten days or such later date as the tribal organization may approve. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970, as amended [29 U.S.C.A. 651 et seq.].

28. Amendment No. 28

At the end of section 110(d) (25 U.S.C. 450m-1(d)), and before the period, add the words: "*except that all such administrative appeals shall be heard by the Interior Board of Contract Appeals.*" Section 110(d) (25 U.S.C. 450m-1(d)) of the Act, as amended, will read:

> (d) The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts *except that all such administrative appeals shall be heard by the Interior Board of Contract Appeals.*

EXPLANATION OF DRAFT TECHNICAL AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT

(May 3, 1993)

1. Amendment No. 1

This amendment will establish a new definition for the term "construction contract," a term which is presently used but not defined in the statute. As defined by the new amendment, the term would exclude architectural and engineering services, as well as programs administered under the Housing Improvement Program and the roads program. As the term is later used in the statute, the amendment will assure that the federal acquisition regulations are not applied to such contracts, which do not involve classic construction activities. **[DOI claims the HIP and roads programs would be exempt from the FARs under the proposed regulations. However, no such provisions appear in the latest draft.]**

2. Amendment No. 2

This amendment conforms portions of section 5(f) of the Act with the 1988 Amendments, and also clarifies the statute by minimizing the reporting requirements which the Secretary may impose upon tribal contractors. One of the primary goals of the 1988 statute was to eliminate excessive and burdensome reporting requirements, a goal which has consistently been resisted by the Departments in the course of developing new regulations. The amendment is designed to compel the Departments to substantially cut back on the amount of reporting now required from tribal contractors.

3. Amendment No. 3

This amendment corrects a typographical error in section 7(a) of the Act, and also conforms the statute with the long-accepted Labor Department interpretation exempting tribal employees from the Davis-Bacon Act.

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4. Amendment No. 4

This amendment adds a new subsection to the statute to recognize tribal employment preferences. Presently, tribes are unable to reconcile the terms of tribal employment rights ordinances (which generally provide for tribal preferences in employment for tribal members) with section 7(b) of the Act (which establishes a general Indian preference). The new amendment will remove this source of conflict by endorsing tribal TERO ordinances where they are in place. [In the draft regulations DOI and DHHS propose competing views on this issue, with DHHS in agreement with tribes.]

5. Amendment No. 5

This amendment reinforces the congressional intent that all programs of the Secretary are contractible without regard to the level within the Department in which a program or a portion of the program is administered. The Secretary may not lawfully refuse to enter into a contract on the grounds that the resources supporting the program are situated at an Area Office or other administrative location rather than in the field.

6. Amendment No. 6

This amendment, together with Amendment No. 10, establishes a mechanism whereby tribal contractors and the Secretary may enter into contracts covering issues of agreement, while matters remaining in disagreement are appealed. (*See* discussion under Amendment No. 10).

7. Amendment No. 7

This amendment reinforces the existing limitations on the Secretary when evaluating the merits of a contract proposal. Although the current law appears unambiguous, the amendment will remove any potential doubt regarding the scope of the Secretary's review. Specifically, a decision to decline a contract, on the ground that services will not be satisfactory, may only be made if the services to be provided by the tribal organization will not be satisfactory.

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8. Amendment No. 8

Consistent with Amendment No. 7, Amendment No. 8 makes clear that when a contract proposal involves the management of trust resources, the Secretary is to confine his or her examination to the trust resources under management by the tribal organization, and not to issues involving the trust resources of other tribes not parties to the contract proposal.

9. Amendment No. 9

This amendment makes clear that the Secretary's determination regarding whether a contract proposal is authorized by the Act (the issue known as "contractibility"), and regarding contract funding levels are issues which must be assessed as part of the contract review and approval process set forth in section 102(a)(2) of the Act. That is, these issues may not be identified as part of some "threshold" assessment, nor in any other way that would escape the critical procedural protections available under section 102.

10. Amendment No. 10

Amendment No. 10 corrects the prevailing departmental misinterpretation that a contract proposal must either be approved in its entirety or declined in its entirety. As originally intended, and as clarified by the new amendment, the Secretary is directed to approve any severable and approvable portion of a contract proposal. The Secretary is free to decline that portion of the contract which he or she determines should not be approved, and the tribal organization is free to appeal that determination as provided in the Act. [The draft regulation addresses this issue only in part.]

11. Amendment No. 11

This amendment makes clear that the Secretary has the burden of proof to establish by clear and convincing evidence that a contract proposal should be declined. The amendment also removes the potential for a very real conflict of interest in resolving appeals, by requiring that appeals be decided at a level no lower than the Assistant Secretary. [The draft regulation would render unnecessary the first sentence.]

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12. Amendment No. 12

This amendment addresses a logistical problem unique to the Alaska Area, where aggressive efforts are underway to lay the groundwork for the contracting of Indian Health Service programs serving the entire Area. The amendment authorizes several tribal organizations to delegate their contracting to a central tribal organization. Without the amendment there may be insurmountable logistical problems in securing tribal resolutions from the approximately 200 Native villages situated throughout some of the most remote regions of America. The amendment includes a notice procedure to assure that tribal prerogatives are fully respected in the contracting process.

13. Amendment No. 13

This amendment addresses both a technical and substantive problem which is present in section 105(a) of the Act. The technical problem is that the 1988 Amendments overlooked the need to conform the 1975 language with the 1988 Amendments. As a substantive matter, the 1988 Amendments have been misconstrued as requiring that the full panoply of federal regulations must apply to construction contracts, despite the congressional intent in 1988 to minimize the application of the FARs on construction contracting activities. The amendment clarifies that the FARs are only to be applied to the limited extent doing so is not inconsistent with the purpose of the Self-Determination Act to remove unnecessary federal administrative oversight.

14. Amendment No. 14

This technical amendment clarifies that a tribe or a tribal organization may both retrocede a program back to the Secretary or rescind a request to retrocede.

15. Amendment No. 15

This amendment has been necessitated by the tendency of some Department representatives to misread the proviso in section 105(g) relating to contracts involving the provision of personal services.

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16. Amendment No. 16

Amendment No. 16 deals with the acquisition of property with contract funds after a contract has been awarded (and also addresses government-furnished property). Deliberations over the past four years over regulatory implementation of the 1988 Amendments have made clear that the congressional authorization to donate property to a tribe or tribal organization is both excessively awkward and unnecessary. Currently, standard grant regulations provide that title to property purchased with grant funds vests in the grantee, and there is no reason why the same rule should not apply to property purchased with self-determination contract funds. To the contrary, the policy reasons underlying the Self-Determination Act strongly counsel in favor of such a regime. Amendment No. 16 does away with the need for a technical "donation" of the property in such circumstances, while providing a mechanism for the return of property still in use to the Secretary (in the event a contracting program is retroceded back to the federal government). **[This Amendment would be partly rendered unnecessary if the draft regulations became final.]**

17. Amendment No. 17

This amendment puts into the statute provisions dealing with the impact of dividing programs which serve many tribes in order to allow one or more tribes to contract for the operation of a portion of such programs. The amendment adds a new subsection 105(i) to codify a procedure for coordinating the contracted programs with the programs remaining under Secretarial administration. **[The proposed regulations would render much, but not all, of this new subsection unnecessary.]**

Amendment No. 17 also adds a new section 105(j) to clarify that tribal organizations are authorized to redesign their programs to best meet their local needs. The amendment is consistent with the approach taken in Title III of the Self-Determination Act, as well as the original 1975 premise underlying the Act, and has been necessitated by the continuing efforts by the Department of the Interior and the Department of Health and Human Services to impose upon tribes program requirements, including reporting requirements, which in many instances compel tribal organizations to virtually duplicate the federal government's programs. Such duplication of programs obviously contradicts the fundamental purpose of the statute to vest in tribes greater authority and self-determination over Indian programs administered under contract.

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Finally, Amendment No. 17 cures a technical problem which has deprived tribal organizations of the ability to take advantage of the same federal airfares and lodging rates which apply when Indian programs are administered by federal employees. This unintended consequence has substantially increased the cost of administering programs subject to the Act. The amendment corrects the problem and puts tribes on a par with federal agencies for the limited purpose of providing mandatory access to these rates for air travel and similar sources of supply which are regularly negotiated by the General Services Administration.

18. Amendment No. 18

This amendment is complementary to Amendment No. 5, providing that the Secretary may not hold back monies which fund a program simply because the monies are allocated for expenditure at a departmental level higher than the field office, service unit or agency level.

19. Amendment No. 19

Amendment No. 19, like other amendments necessitated by an incorrect and narrow reading of the statute, makes clear that savings in construction cost-reimbursement contracts do not go back to the Government, but instead are to remain with the tribal contractor and subject to the Act's provisions regarding "savings". Such savings are in excess of whatever profit may have been negotiated as part of such contract.

20. Amendment No. 20

This amendment clarifies that the costs incurred in preparing for entering into a contract are to be paid to a contractor as part of the contract support costs payable under section 106 of the Act. **[Under the draft regulations these issues are dealt with as either pre-award costs or start-up costs.]**

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21. Amendment No. 21

This amendment makes clear that the Secretaries are required to report to Congress on all deficiencies regarding contract support costs. With this information Congress can then make an informed decision regarding the need to appropriate funds to address such deficiencies. **[The proposed regulations would partly render this amendment unnecessary.]**

22. Amendment No. 22

This amendment is designed to deal with the tangential adverse impacts which contracting activities may produce on other portions of the Secretary's programs. In the event contracting activities, in fact, lead directly to a lower level of services being provided by the Secretary to other, non-contracting tribes, the new language will provide a mechanism for the Secretary to report the resulting funding needs to Congress.

23. Amendment No. 23

Amendment No. 23 deals with the persistent problem created by the failure of many agencies, both state and federal, to pay the full negotiated indirect cost rate which is negotiated by the tribal organization and the federal government. The result is that tribal organizations are perpetually underfunded in the administration of their programs. Amendment No. 23 deals with this problem by requiring that all agencies respect and pay the full negotiated indirect cost rate, and also requires that in the event of a shortfall the Secretary is responsible for funding such amounts. In this manner, Congress will have a single point of contact for appropriating funds to cure such deficiencies.

24. Amendment No. 24

This amendment defines when the 365 day statute of limitation begins to run under section 106(f) of the Act.

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25. Amendment No. 25

This amendment adds six new subsections to section 106 of the Act.

New subsections (j) and (k) address the cost principles applicable to self-determination contracts. The purpose of these amendments is to remove those provisions of presently-applicable circulars which impede, rather than foster, the administration of self-determination contracts. While these improvements have been made in Title III "compacts" entered into under the Act, the Departments have resisted extending these innovations to self-determination contracting. **[The proposed regulations address very few of these issues.]**

New subsection (l) directs the Office of Management and Budget to develop a new set of cost principles unique to tribal organizations. The current set of cost principles are neither tailored to tribes nor consistent with modern practices in the government-to-government relationship which underlies the self-determination contracting process.

New subsection (m) would make clear that the Secretary is without authority to suspend payments under a contract. If contract compliance issues require emergency action, the Secretary may proceed to reassume the contract under section 109. Otherwise, and in the absence of any action to reassume a contract under section 109 (either on an emergency basis or otherwise), the Secretary is limited to the remedies provided under the Contract Disputes Act.

New subsection (n) codifies the current policy and practice regarding program income earned by a tribal organization during the course of administering a contract (such as third party income paid by insurance companies insuring Indian patients served by a tribal organization's health program). **[The proposed regulations would render this section unnecessary.]**

New subsection (o) requires that the Secretary pass on the reduced administrative burden, in the form of savings, to tribes resulting from the transfer of programs from Secretarial administration to tribal administration. As observed in 1988, Congress's goal of shifting resources to tribal operation has continually been frustrated by the enormous growth in the government's contract monitoring and contract administration bureaucracy. The reduced role of the Secretaries in the wake of contracting activities requires that the bureaucracy be correspondingly trimmed and the savings put into tribal program

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administration so as to increase the quality and quantity of services provided to Indian people.

26. Amendment No. 26

This amendment makes clear that the effectiveness of these amendments, and of prior amendments, does not await the promulgation of new regulations at some unknown time in the future. Further, the section makes clear these amendments are retroactive to the effective date of the original 1988 Amendments.

27. Amendment No. 27

This amendment provides a statutory basis for the Secretary to use the emergency reassumption provisions of the Act when there is an imminent and substantial threat of irreparable harm to trust resources.

28. Amendment No. 28

This amendment directs that all appeals arising out of the Contract Disputes Act be heard by the Interior Board of Contract Appeals. The amendment will do away with the current practice of referring such appeals from the Department of Health and Human Services to the Armed Services Board of Contract Appeals. [The proposed regulations would render this section unnecessary.]

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STATEMENT OF S. BOBO DEAN, ESQ.
BEFORE
THE SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON THE PROPOSED REGULATIONS UNDER THE
INDIAN SELF-DETERMINATION ACT
MAY 14, 1993

Mr. Chairman, my name is S. Bobo Dean. I am a partner in the law firm of Hobbs, Straus, Dean and Wilder of Washington, D.C. and Portland, Oregon. I appreciate your invitation to testify on the proposed regulations to implement the 1988 Amendments to the Indian Self-Determination and Education Assistance Act. Since 1988 our firm has represented a number of Indian tribes and tribal organizations in connection with the development of the regulations to implement the Indian Self-Determination Amendments of 1988.

I present this testimony on behalf of the Miccosukee Tribe of Indians of Florida, the Menominee Indian Tribe of Wisconsin, the Seminole Tribe of Florida, the Mississippi Band of Choctaw Indians, the Metlakatla Indian Community in Alaska, the Bristol Bay Area Health Corporation, the Norton Sound Health Corporation and the Maniilaq Association. These tribes and tribal organizations are opposed to the promulgation of the regulations in their present form. The Administration should not publish these regulations for formal comment at this time but should re-examine them in light of criticisms which they have received from many tribes. A national conference with Indian tribes on the regulations has been promised by federal representatives but was to take place following the publication for public comment. We recommend that the Clinton Administration schedule its own national conference with Indian tribes so that it can address and enter into direct dialogue with the tribes about the regulations. We urge this Committee to recommend that approach.

The 1988 Amendments expressly required that the Department of the Interior and the Department of Health and Human Services formulate the regulations with the participation of Indian tribes. The statute also required that the regulations be promulgated within ten months from October 5, 1988. No regulations have been promulgated. The agencies did involve tribal representatives in a series of meetings between November 1988 and September 1990 and developed drafts of the

regulations which incorporated significant tribal recommendations.

The proposed regulations are the result of consultation between the two Departments, without any tribal involvement between August 1990 and January 1993. They depart in many significant respects from the recommendations received from tribes and from earlier drafts. In some areas, the agencies have utilized the opportunity to formulate new regulations as an occasion to eliminate language in the existing self-determination regulations which limit agency authority or otherwise encourage tribal self-determination and further the goals of the Act.

We have provided your staff with a detailed written analysis of the proposed regulations (dated March 18, 1993, revised May 18, 1993). In this statement today we will focus on a number of provisions which illus-trate the failure of the agencies to carry out the mandate of the legislation and to reflect the recommendations of tribal representatives.

In our testimony on an earlier version of the regulations before this Committee on June 9, 1989, we criticized the IHS position that a dispute over the level of funding requested in a contract proposal does not give rise to a "declination issue". In other words, when the tribe requests more dollars to run a program than the agency says it should have, the agency need not decline the proposal and provide an appeal and hearing as required by the Act, because it is not disapproving the proposal. According to IHS it would be approving the tribal proposal, but at a lower level of funding.

This unusual interpretation is now embodied in subpart H of the proposed regulations in clear conflict with statutory law. Section 102 of the Indian Self-Determination Act mandates that when Interior or HHS receives a tribal proposal, it must either approve the proposal within the statutory time-frames or decline it, provide notice of the grounds for declination, technical assistance to overcome deficiencies, and an appeal and a meaningful, due-process hearing on the agency objections raised to the proposal, if requested by the tribe. Both BIA and IHS in the proposed regulations distinguish an objection based on the amount of funding requested from other objections to a contract proposal. Both maintain that disapproving the amount of funding requested in the proposal is not a "declination". We find no justification in the plain language of the Act, or in reason or public policy, for this distinction.

However, having agreed with HHS that refusing to contract due to a funding objection is not a declination, Interior provides the same appeal rights to tribes whose proposal is rejected on funding grounds as on other grounds. While we differ with Interior in principle, it has compromised to the point that the matter has become moot.

HHS, on the other hand, is adamant that it will not provide a meaningful "due process" hearing before an administrative law judge or other official at a higher level than the IHS Director in such cases. Instead, in an effort to compromise, it has agreed to provide an appeal in a funding dispute to a board appointed by the IHS Director and further made clear that the final decision in such matters will be made by the IHS Director and that no administrative judge or other HHS official will ever be permitted to re-examine the decisions as to funding allocations made by the IHS Director.

We have gone to some length over several years, both in writing and orally, to explain to federal representatives the lack of foundation in the Act for the special treatment accorded by their proposed regulatory language to funding appeals, including a detailed letter provided to both agencies on June 22, 1990. We have provided the Committee staff with a copy of that letter. Our arguments have never been answered and have been disregarded in the proposed regulations. We should point out that the proposed regulations not only depart from the plain requirements of the 1988 Amendments but also from the existing regulations of both agencies issued under the original Act, which clearly grant a declination appeal to a tribe whose proposal is rejected on funding grounds. 25 C.F.R. §§ 271.14(i)(4) and 271.25; 42 C.F.R. §§ 36.212(i), 36.214. Thus, the agencies have used the opportunity to write new regulations, not to further the legislative goal to strengthen tribal government, but to narrow tribal rights.

A second area in which the agencies have used this chance to re-write the regulations for their own bureaucratic purposes involves the regulatory requirements with respect to agency program guidelines. Since 1975 BIA regulations have provided expressly that inconsistencies between tribal program plans and designs for contract operation of Bureau programs and Bureau Manuals, guidelines, or other procedures that are appropriate to programs or parts of programs operated by the Bureau "are not grounds for declination". 25 C.F.R. § 271.15(d). This provision merely reflects the

mandate of the Act that proposals be declined on one of the three statutory grounds (unsatisfactory services to Indians, non-protection of trust resources, or that the proposed program cannot be properly completed or maintained) and that tribes are free to depart from BIA guidelines as long as they satisfy the declination criteria. The burden of proof under the existing regulations is on the Bureau to prove that declination is based on the statutory grounds. 25 C.F.R. § 271.15(a).

However, under the proposed regulations (Subpart O) tribal proposals must adhere to all regulations, orders, policies, agency manuals, guidelines, industry standards and personnel qualifications to the extent that they have actually been observed by the federal agency. While the tribe may request a variance, Interior has removed the express language of the existing regulations quoted above that makes crystal clear that non-conformity with agency guidelines does not provide a basis for declining to contract. This change also runs counter to the intent of Congress in the 1988 Amendments to encourage tribal flexibility to re-design programs. See Sen. Rept. 100-274 at page 5.

In Subpart N, the HHS has introduced a similar approach which narrows the flexibility permitted to tribes in developing contract scopes of work. In consultation with tribes the IHS representatives agreed that a tribal contractor of a hospital or clinic could commit to operate the facility in conformity with the standards of the Joint Commission on the Accreditation of Health Organizations and, if it achieved and maintained JCAHO accreditation, the contract need not include detailed scope of work provisions which have typically been included in such self-determination contracts (or, in the alternative, the contractor could rely on Health Care Finance Administration requirements). The intent was to simplify contract language and use JCAHO or HCFA compliance, where possible, as an alternative to detailed standards to be included in the contract documents.

As these provisions have emerged in Subpart N of the proposed regulations, a tribal proposal must now include an assurance of compliance with JCAHO (or HCFA) standards and the regulations contain no provision for an alternative in case a facility is not accredited or in compliance with such standards. At least one IHS-operated hospital is not now in compliance with JCAHO standards and many IHS-funded clinics are not in compliance with either JCAHO or HCFA. The proposed regulations imply that no facilities not in compliance

with JCAHO or HCFA standards can be contracted and that, if a contracted facility falls out of compliance, the contractor would be in default and the IHS might well be entitled to utilize such default as a basis for cancelling the contract and reassuming the operation of the facility.

In addition, we wish at this time to bring to the Committee's attention certain deficiencies in Subpart D relating to financial management. Tribal representatives throughout the consultation process argued that the unique relationship between the United States and the Indian tribes and the unique purposes of this Act (to end "the prolonged federal domination of Indian service programs", and to encourage "the development of strong and stable tribal governments") justify the development of certain cost principles specific to self-determination contracts. Their view was that cost principles issued by the Office of Management and Budget for grants to State governments and to private non-profit organizations were not always appropriate for application to the transfer of functions of Interior and HHS to tribal governments. In earlier versions of the regulations, the agencies agreed with this view and included certain cost principles which could be followed by tribal contracts instead of those promulgated in OMB Circulars.

The proposed regulations have retreated from this concession to tribal wishes. They require that tribal governments comply with OMB Circular A-87 and that tribal contractors which are non-profit organizations comply with OMB Circular A-122. Our clients object to this provision on two grounds. They remain convinced that the allowability of costs with respect to certain activities should be different for tribes to further self-determination goals. We have attached to this statement a list of specific examples of special cost provisions included in the 1990 version of the joint regulations and eliminated in the 1993 version.

In addition, any tribal organization which has been authorized to contract by a tribal government or governments under the Act is an instrumentality of tribal government and should have the right to elect to be audited under A-87 if it wishes, rather than A-122. This option was allowed under the last draft of the regulations and has been eliminated in the proposed regulations.

In one respect the proposed regulations violate their own rule by interposing in section 100.108 a provision against payment of legal expenses in connection with admin-

istrative appeals where the applicable OMB Circular would allow payment. (See Item 5 in Attachment.) This will discourage tribes from asserting their rights under the Act and from utilizing the appeal mechanisms which the regulations provide. This rule is more restrictive than OMB Circular A-87 which merely makes unallowable the costs of "prosecution of claims against the United States".

The agencies argue that the extension of the Equal Access to Justice Act to administrative appeals under the self-determination regulations necessarily precludes the use of contract funds to pay the costs of such appeals. We find no basis for this conclusion in the statute, and the goals of the Act are clearly furthered by assuring that some reasonable legal assistance is available to the tribal contractor in asserting its legal rights. Tribal representatives had asked that the extent to which contract funds could be used in such cases should be clarified to allow such funds to be used for appeals until an administrative decision is rendered which is final for the Department. Use of contract funds to prosecute claims against the United States in court would be barred under this tribal proposal.

We note that the language of the proposed regulations in barring the use of contract funds to assert tribal rights in administrative appeals is in direct conflict with the statement of this Committee in Report No. 100-274 at page 35 that:

> "Section 110(c) also leaves unchanged certain provisions in the existing law concerning treatment of legal expenses by self-determination contractors. Under these provisions, contractors may treat legal expenses incurred in the administrative proceedings within the Department of the Interior or the Department of Health and Human Services involving enforcement of self-determination contract rights as allowable costs incurred in the administration of those contracts. Self-determination contractors may not use indirect costs, however, to pay for legal fees incurred in prosecuting claims for monetary relief against the Federal Government in court."

Finally, in the memorandum of March 18, 1993, which we have furnished to Committee Staff, we have commented in detail on the proposed Subpart J covering self-determination construction contracts. Both Interior and IHS have expan-

sively interpreted existing statutory language which provides that all contracts, other than construction contracts, shall not be subject to the Federal Acquisition Regulations, as a license to apply a vast number of questionably relevant FARs to construction contracts with tribes and tribal organizations. We have repeatedly called the agencies' attention to the fact that the Act authorizes the waiver of federal procurement clauses which are inconsistent with the Act or inappropriate for self-determination contracts. The proposed regulations also expand the class of construction contracts to include not only actual construction but also architectural and engineering services and many kinds of procurement such as equipment and furnishings, when related to a construction contract, and cadastral surveys, even when unconnected with construction.

We have provided your staff with a detailed analysis of the regulations which contains numerous other instances in which they violate either the basic federal policy of Indian self-determination or, in some cases, specific provisions of the Act. We share the views expressed by Mr. Miller and those which we expect Mr. Clapham to express.

We suggest that the Committee also look carefully at the position taken by the Department of Health and Human Services that no one of its agencies, other than IHS, is subject to the provisions of the Act. In connection with the issue of contractibility which Mr. Miller has discussed, the proposed regulations narrow the scope of the Act to apply only to the "operation of services". This proposed regulation is obviously inconsistent with section 102 of the Act which is not limited to the "operation of services". We believe that this language is designed to exclude other agencies of HHS (such as the Administration for Native Americans and Headstart) from self-determination contracting. Several of our clients have expressed an interest in obtaining their ANA and Headstart funding under self-determination contracts.

The serious departures from the intent of the Congress manifested in the Joint Draft raise questions as to what can possibly motivate these Departments, or at least the officials thereof who have been involved in the development of the Joint Draft. We offer three anecdotal explanations. One high-ranking official of the Indian Health Service, during the process of consultation, spoke scornfully to tribal representatives of the Senate Report 100-274 as not representing legislative history of the 1988 Amendments since it accompanied a different bill. We found this curious since

the bill passed was almost identical to that accompanying S. Rept. 100-274.

On another occasion a government attorney was asked on a point in dispute what the agency would do if the Congress passed a further amendment to remove any doubt that the Indian interpretation is correct. He responded: "We would fight it."

Finally, one federal official explained to tribal representatives that the purpose of the regulations should be to provide a "level playing field" on which the Indians and the federal bureaucrats may contend. We are reminded of the poetic phrase: "Ignorant armies clash by night." However, here, only one of the armies is ignorant.

Thank you for the opportunity to present these comments.

Special "638" Cost Principles
(Subpart D - August 31, 1990 Version -- eliminated in 1993 Version)

1. Matching Requirements for federal, state and other programs (watered down in § 900.403 of Joint Draft so that the effect is merely to state that nothing in the Joint Draft is to be construed to prohibit the use of "638" funds for matching purposes.)

2. Depreciation (including facilities constructed with federal funds) -- This has been modified so that a tribal contractor may not include a depreciation charge in its contract budget for facilities financed by federal grants. Since tribes are heavily dependent on federal financing for facilities this principle severely inhibits the ability of tribes to plan the replacement of tribal facilities used in "638" programs.

3. Publication and printing costs in support of the contracted program, including providing program-related information to Indian beneficiaries. BIA has in the past disallowed the costs of making information on contracted programs available to the Indians.

4. Rental and other space costs (whether or not facility is tribally-owned). Both agencies severely restrict rental of space from tribes for "638" programs.

5. Management studies and professional services (allowable except for prosecution or defense of claims against federal government in court -- costs allowable in contract dispute until final agency decision). The federal position is that no contract funds may be used for legal advice in connection with an administrative appeal of agency actions (declinations, contract disputes, etc.). They claim this results from the extension of the Equal Access to Justice Act rights in such appeals, but EAJA only permits recovery of legal fees in very narrow circumstances. The clear effect (and apparently, the intent) of these provisions in the Joint Draft is to make as difficult as possible the assertion of tribal rights when denied by federal agency action. Level playing field, indeed!

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6. Indirect costs. Indirect cost rates negotiated with "cognizant federal agency" are applicable to self-determination contracts. Indirect costs are reimbursable in accordance with such rates and actual under-recoveries due to failure of a federal, state or other agency to pay full negotiated rate to be paid by the Secretary to the extent funds are appropriated by Congress. The Joint Draft indicates that the Secretary "may" pay indirect costs when Congress appropriates funds for the purpose but need not do so.

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